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RECORD, CASE No. 13,069.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 91.

SCHUYLER'S STEAM TOW-BOAT LINE, PLAINTIFF IN ERROR,

vs.

JOHN SALISBURY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 7, 1888.

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INDEX.

	Original.	Print.
Clerk's certificate	*a*	1
Assignment of errors	*b*	1
Writ of error	*n*	5
Citation	*p*	6
Bond	*r*	6
Remittitur	*v*	8
Notice of appeal to court of appeals	*z*	9
Appeal book	1	10
Notice of appeal to court of appeals	2	10
Sheriff's certificate of service of summons and complaint	3	11
Summons	3	11
Complaint	4	11
Answer	6	13
Verdict, January 30, 1879	8	14
Judgment, August 15, 1882	9	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1891.

	Original.	Print.
Judgment of court in general term	9	15
Verdict, April 26, 1884	10	15
Judgment, October 11, 1884	11	16
Case and exceptions	12	16
Testimony of James Smith	12	17
Samuel Brousseau	42	43
Bernard Lynch	65	63
Aimee Ayers	86	81
Edward Brousseau	88	82
Charles Nelson	90	85
John Salisbury	121	111
James Smith (recalled)	149	133
Samuel Brousseau (recalled)	152	135
Charles Nelson (recalled)	152	136
William Hull	155	138
Hezekiah Van Loan	156	138
George Van Loan	157	140
Enos R. Edmonds	159	141
William Brooks	159	142
Motion for nonsuit	160	142
Ruling on motion for nonsuit	161	143
Testimony of William Ryan	169	149
Stephen V. R. Ableman	172	151
Rudolph Atherton	177	155
Edwin S. Cunningham	179	151
Levi L. De Noyalles	190	166
William H. Foote	200	174
Levi L. De Noyalles (recalled)	209	182
Charles Nelson (recalled)	209	182
Harvey Temple	214	186
Charles Nelson (recalled)	226	195
Benjamin Warford	228	197
Objections to rebuttal evidence and ruling thereon	231	200
Testimony of Philip Lansing	233	201
Theodore Briggs	285	242
Thomas Briggs	297	252
John D. Silliman	302	256
Thomas A. Briggs (resumed)	305	259
Levi L. De Noyelles (recalled)	317	268
John Read	318	269
William Walker	326	275
Jacob Carr	329	278
Harvey Temple (recalled)	331	279
Levi L. De Noyelles (recalled)	331	280
Edwin Cunningham (recalled)	332	280
John Read (recalled)	332	280
Charge, requests to charge, and exceptions	332	281
Order denying motion to set aside verdict	362	301
Judge's certificate to case	363	301
Notice of appeal to general term	363	302
Clerk's certificate	364	302
Statement under Rule 41	364	302

	Original.	Print.
Judgment of general term, October 8, 1885	365	303
Judgment-roll	366	303
Opinion in general term	367½	304
Affidavit of filing record on remittitur	374	308
Order for judgment on remittitur	375	309
Judgment on remittitur	377	309

a United States Supreme Court.

SCHUYLER STEAM TOW-BOAT LINE, Plaintiff in Error,
vs.
JOHN SALISBURY, Defendant in Error.

STATE OF NEW YORK,
County of Columbia, } *ss:*

By virtue of the writ of error issued by the Supreme Court of the United States in this action, and which is hereto annexed, I do hereby make return and certify that I have compared the annexed copy of the record in my office in this action with the original on file in this office, and the same is a correct transcript therefrom and of the whole of said original; and I further certify that the annexed bond, assignment of error, and citation, with proof of — same, were filed in my office on the 10th day of February, 1888, and are herewith returned in pursuance of which writ of error and the law and practice in such case provided.

And I further certify that no opinion or opinions have been filed in this case except as contained in said record.

In testimony whereof I have hereunto set
Columbia County Seal. my hand and affixed the seal of the said courts and county this 27th day of August, A. D. 1888.

WM. S. HALLENBECK, *Clerk.*

b Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-eight.

SCHUYLER'S STEAM TOW-BOAT LINE, Plaintiff in Error,
vs.
JOHN SALISBURY, Defendant in Error. } In Error.

Afterward, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Schuyler Steam Tow-Boat Line, by Worthington Frothingham, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: that by the record it appears that the said supreme court of the State of New York and the court of appeals of the State of New York held that the statute of the United States, to wit, section 4233 of the Revised Statutes of the United States, and the authority exercised thereunder, is invalid, whereas the said
c court should have decided that the said statute and the authority exercised thereunder were valid, and that the violation thereof by the said defendant in error in displaying false and unauthorized lights caused or contributed to the loss or damage complained of by him in his bill of complaint.

Second. For the reason that it appears by the said record that the

said supreme court of the State of New York and the said court of appeals of the State of New York held and decided that the Constitution of the United States wherein and whereby it confers jurisdiction over all cases of maritime and admiralty and all authority exercised under the United States by virtue of the Constitution and its admiralty laws and practice were invalid and inoperative, whereas the said courts should have decided that by virtue of the said provision of the Constitution and the admiralty laws of the United States the said supreme court of the State of New York had no jurisdiction over the subject-matter of this action.

d Third. For the reason that it appears by the said record that the said supreme court of the State of New York and the said court of appeals of the State of New York held and decided that the rule in admiralty, established and adopted in pursuance of the Constitution of the United States, which requires that a vessel enrolled under the laws of the United States while being navigated in waters subject to the admiralty jurisdiction of the United States shall be under the charge or command of a competent master or captain, was inoperative and invalid, whereas the said courts should have decided that by virtue of the said rule and practice the defendant in error caused or contributed to the loss or damage complained of by him by deserting his barge and leaving it without the care and management of a competent master and navigator and without any small boat to be used in case of emergency.

Fourth. For the reason that it appears by the said record that the said supreme court of the State of New York and the said court of appeals held and decided that the rule in admiralty, established and adopted in pursuance of the Constitution of the

e United States, which requires that a vessel enrolled under the laws of the United States while being navigated in waters subject to the admiralty jurisdiction of the United States shall have a sufficient watch or lookout on such vessel, was invalid and inoperative, whereas the said courts should have decided that by virtue of said rule and practice in admiralty the defendant in error caused or contributed to the loss or damage complained of by him by omitting to have a proper watch or lookout at the time of the alleged accident complained of by him.

Fifth. For the reason that it appears by the said record that the said supreme court of the State of New York and the said court of appeals held and decided that the statute of the United States, to wit, sections 4192, 4193, and 4194 of the Revised Statutes of the United States, and the authority exercised thereunder, is invalid, whereas the said courts should have decided that the said

f statute and the authority exercised thereunder were valid, and that the defendant in error by making the mortgages shown by the record herein and the mortgagees by recording the same in pursuance of the said statute, and the same having become due and remaining unpaid, and the said mortgagees having served a notice upon the plaintiff in error that all damages resulting from the accident alleged by said defendant in error must be paid to them—that thereby and by virtue of the said sections of the statute

aforesaid the said mortgagees were the real parties in interest, and the defendant in error had thereby divested himself of any right to recover in said action.

Sixth. For the reason that it appears by the said record that the contract under which the barge of the defendant in error was towed was a maritime contract, and that said supreme court of the State of New York and said court of appeals decided that said contract "meant this and this only, that the steamboat is not liable for such perils as result from causes beyond their control," whereas
g the said courts should have decided that said contract was a maritime contract; that it should be construed according to the maritime and admiralty laws of the United States, and that it meant that the plaintiff in error was liable for negligence only.

Seventh. For the reason that it appears by the said record that the barge of the defendant in error was being towed in a fleet of barges and boats that were fastened together by lines belonging to the respective boats, including lines belonging to the barge of the defendant in error, and not by lines belonging to or under the control of the plaintiff in error, and which method of towing was in accordance with the maritime customs and laws of the United States; that said supreme court of the State of New York and said court of appeals decided "that such line or lines must be deemed that of the steamer, and the defendant is called upon to explain the occurrence and show that it was not at fault in that particular;" also that "it was *prima facie* negligence upon the part of the steamer to permit them to
h break;" also that "if a towing-line broke it must be shown it broke through no fault of theirs" (meaning the plaintiff in error), "it having used due and ordinary care in inspecting such line prior to its being used;" also that "it is for the defendant to excuse itself by showing that the accident happened notwithstanding the use of all due, proper, and ordinary care on its part;"

Also "whether the owners of these various canal-boats were bound to furnish the ropes which connect them would be a question as between each boat and the steamer;" whereas the said courts should have decided that the method of attaching said boats together was in accordance with the maritime and admiralty rules and practice of the United States; that the plaintiff in error was not an insurer of said lines; that said lines were not the lines of the steamer; that it was not *prima facie* negligence upon the part of the steamer to permit them to break; that it was not incumbent on said plaintiff in error to show that said lines broke through no fault of theirs, or that said accident happened notwithstanding the use of
i all due, proper, and ordinary care on its part, and that by the maritime contract in this case and the rules of admiralty the owners of the various canal-boats were bound to furnish the ropes which connect them, and it was not a question between each boat and the steamer, and that the rights of the parties should be determined according to the admiralty laws and rules of the United States.

Eighth. For the reason that it appears by the record that the defendant therein claimed immunity under the statute of the United

States, namely, section 4233 of the Revised Statutes, because of the absence of the requisite lights and the displaying of improper lights, namely, lights indicating a steam tow-boat while in the act of towing, and because of the violation of the said statute of the United States by the plaintiff, moved for and claimed a nonsuit on the ground that such violation of the statute of the United States was an act of negligence and contributed to the accident; and the
j said supreme court and court of appeals of the State of New York decided against the immunity claimed by defendant under said statute and by reason of the violation thereof, and denied said motion for a nonsuit, whereas the said court should have sustained the claim of the defendant to such immunity and have granted such motion.

Ninth. For the reason that the said supreme court erroneously refused to charge the jury, when requested by defendant, that it was incumbent upon the plaintiff to show that the absence of proper lights and the displaying of improper lights did not contribute to the injury for which the action was brought, to which refusal the defendant duly excepted, whereas the said court should have granted such motion and instructed the jury as requested; and the said supreme court and court of appeals refused to reverse the judgment and grant a new trial by reason of such error in the trial court, whereas such judgment should have been reversed and such
k new trial granted, and by such decision the said supreme court and court of appeals decided against the claim made by the defendant under the statute aforesaid and under the authority of the United States.

Tenth. For the reason that it appears in said record that the barge of the defendant in error was overloaded, and said supreme court of the State of New — and said court of appeals decided that the plaintiff in error was liable for the alleged negligence, whereas they should have decided that the overloading of the said barge was contrary to the admiralty and maritime laws of the United States, and that the defendant in error thereby contributed to the alleged accident.

Eleventh. For the reason that it appears in and by said record that the said judgment was given for the said defendant in error against the plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in
l error against the defendant in error, and the said Schuyler's Steam Tow-Boat Line prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, etc.

WORTHINGTON FROTHINGHAM,
Attorney for Plaintiff in Error.

m [Endorsed:] U. S. Supreme Court. Schuyler's Steam Tow-Boat Line, pl'ff in error, *vs.* John Salisbury, def't in error. Assignment of error. Worthington Frothingham, att'y for pl'ff in error, Albany, N Y. Columbia Co. clerk's office. Filed Feb. 10, 1888.

n UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, being possessed of the record and proceedings upon a remittitur from the court of appeals of the State of New York, Greeting:

Seal of the Supreme Court of the United States.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, upon a remittitur from the court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Salisbury, plaintiff, and Schuyler's Steam Tow-Boat Line, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction
o of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] (Original.) E. Columbia Co. clerk's office. Filed Feb. 10, 1888.

p The United States of America to John Salisbury, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk' office of the supreme court of the State of New York, wherein Schuyler's Steam Tow-Boat Line is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States, this sixth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

SAM'L BLATCHFORD.

q Admission of the within citation admitted this 10th day of February, 1888.

JOHN SALISBURY,
By CADY & HOYSRADT,
His Attorneys.

UNITED STATES OF AMERICA, }
County of Columbia. }

On this 10th day of February, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared Worthington Frothingham before me, the subscriber, a notary public for the said county of Columbia, and makes oath that he delivered a true copy of the within citation to J. R. Cady, Esq., attorney for John Salisbury, defendant, who thereupon made admission of the service thereof as above contained.

W. FROTHINGHAM.

Sworn to and subscribed the 10th February, A. D. 1888.

J. RIDER CADY,
Notary Public, Col. Co., N. Y.

[Endorsed:] (Original.) E. Columbia Co., clerk's office. Filed Feb. 10, 1888.

r United States Supreme Court.

SCHUYLER'S STEAM TOW-BOAT LINE, Plaintiff in Error, }
vs.
JOHN SALISBURY, Defendant in Error. }

Know all men by these presents that we, Samuel Schuyler and Thomas V. Wolcott, both of the city of Albany, in the State of New York, are held and firmly bound unto John Salisbury in the sum of fifteen thousand dollars, current money of the United States, to be paid to the said John Salisbury, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made,

we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of February, 1888.

Whereas lately, in the supreme court of the State of New York, in a suit depending in said court between the above-named John Salisbury, as plaintiff, and Schuyler's Steam Tow-Boat Line, as defendant, the said John Salisbury recovered a judgment
s against the said Schuyler's Steam Tow-Boat Line for $5,175.70 damages and $1,184.67 costs; and whereas on appeal from said judgment to the court of appeals of the State of New York, which is the highest court in said State, the said judgment was affirmed and the said Schuyler's Steam Tow-Boat Line is about to apply for a writ of error to remove the said cause to the Supreme Court of the United States to reverse the said judgment, and for a citation directed to the said John Salisbury, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Schuyler's Steam Tow-Boat Line shall well and truly prosecute its writ of error to effect and if it fails to make its plea good shall answer all damages and costs, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL SCHUYLER. [SEAL.]
THOS. V. WOLCOTT. [SEAL.]

Sealed and delivered in presence of—
MONROE CRANNELL.

t UNITED STATES OF AMERICA, }
Northern District of New York, County of Albany. }

On this fourth day of February, 1888, before me came Samuel Schuyler and Thomas V. Wolcott, to me known to be the same persons described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

[Seal Monroe Crannell, Notary Public, Albany, N. Y.]

MONROE CRANNELL,
Notary Public, Albany County, New York.

UNITED STATES OF AMERICA, }
Northern District of New York, County of Albany. }

Samuel Schuyler and Thomas V. Wolcott, being severally sworn, say and each for himself says that he resides in the city & county of Albany, in the State of New York; that he is worth the sum of fifteen thousand dollars over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt
u by law from levy and sale under execution, and the said Schuyler says he is a freeholder of the county of Albany, in

said State, and the said Wolcott that he is a freeholder of the county of Saratoga, in said State.

SAMUEL SCHUYLER.
THOS. V. WOLCOTT.

Severally sworn to and subscribed before me this 4th day of February, 1888.

[Seal Monroe Crannell, Notary Public, Albany, N. Y.]

MONROE CRANNELL,
Notary Public, Albany County, New York.

[Endorsed:] United States Supreme Court. Schuyler Steam Tow-Boat Line, pl'ff in error, *vs.* John Salisbury, defendant in error. Bond in error. W. Frothingham, attorney for pl'ff in error, Albany, N. Y. Columbia Co. clerk's office. Filed Feb. 10, 1888.

The foregoing bond is approved, the same to operate as a supersedeas and stay of execution.

February 6th, 1888.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

v Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 17th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding; E. O. Perrin, clerk.

Remittitur, January 17, 1888.

w JOHN SALISBURY, Respondent,
ag'st
SCHUYLER STEAM TOW-BOAT LINE, Appellant.

Be it remembered that on the 12th day of November, in the year of our Lord one thousand eight hundred and eighty-five, Schuyler Steam Tow-Boat Line, the appellant in this action, came here into the court of appeals, by Frothingham, its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and John Salisbury, the respondent in said action, afterwards appeared in said court of appeals, by Cady and Hoysradt, his attorneys.

x Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Frothingham, of counsel for the appellant, and by Mr. R. E. Andrews, of counsel for the respondent, and after due de-

liberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

y Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Jan'y* 17, 1888.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

Seal State of New York Court of Appeals.

E. O. PERRIN, *Clerk.*

z Supreme Court.

JOHN SALISBURY
ag'st
SCHUYLER STEAM TOW-BOAT LINE.

Please take notice that the defendant, Schuyler's Steam Tow-Boat Line, appeals to the court of appeals from a judgment in favor of the plaintiff, John Salisbury, ag'st the said defendant entered in the Columbia county clerk's office on the 21st day of October, 1885, for $79 and the affirmance of a judgment recovered in favor of said plaintiff against said defendant on the 11th day of October, 1884, for $6,360.37 and from the whole of said judgment.

Albany, October 28th, 1885.

Yours, &c.,
W. FROTHINGHAM,
Appellant's Attorney, 69 State Street, Albany, N. Y.

To Cady & Hoysradt, Esqrs., pl'ff's att'ys, and to the clerk of Columbia county.

STATE OF NEW YORK,
Columbia County, Clerk's Office, } ss:

I, William S. Hallenbeck, clerk of the county of Columbia, and

Seal Columbia County

also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the foregoing copy notice of appeal (John Salisbury *vs.* Schuyler Steam Tow-Boat Line) with the original thereof, filed October 31, 1885, and remaining in this office, and that the same is a true and correct transcript of such original notice and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of the said courts and county this 5th day of November, A. D. 1885.

WM. S. HALLENBECK, *Clerk.*

1 In the Court of Appeals of the State of New York.

JOHN SALISBURY, Respondent,
against
SCHUYLER STEAM TOW-BOAT LINE, Appellant.

Appeal Book.

Cady & Hoysradt, plaintiff's attorneys; Worthington Frothingham, defendant's attorney.

2

JOHN SALISBURY, Respondent,
against
SCHUYLER STEAM TOW-BOAT LINE, Appellant.

Please take notice that the defendant, Schuyler Steam Tow-Boat Line, appeals to the court of appeals from a judgment in favor of the plaintiff, John Salisbury, against the said defendant, entered in the Columbia county clerk's office on the 21st day of October, 1885, for $79 and the affirmance of a judgment recovered in favor of said plaintiff against said defendant on the 11th day of October, 1884, for $6,360.37 and from the whole of said judgment.

Yours, etc.,
W. FROTHINGHAM,
Appellant's Attorney, 69 State St., Albany, N. Y.

To Cady & Hoysradt, Esqs., pl'ff's att'y-, and to the clerk of Columbia county.

Albany, October 28, 1885.

STATE OF NEW YORK,
Columbia County, Clerk's Office, } *ss:*

I, Wiliam S. Hallenbeck, clerk of the county of Columbia, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the foregoing copy notice of appeal (John Salisbury *v.* Schuyler Steam Tow-Boat Line) with the original thereof, filed October 31, 1885, and remaining in this office, and the same is a true and correct transcript of such original notice and of the whole thereof.

[L. S.] In testimony whereof I have hereunto set my hand and affixed the seal of said court and county this 5th day of November, 1885.

WM. S. HALLENBECK, *Clerk.*

3 In the Supreme Court of the State of New York.

STATE OF NEW YORK, *City and County of Albany,* } ss:

I certify that on the 18th day of April, 1871, I served the summons and complaint hereto annexed upon Samuel Schuyler, the president of The Schuyler Steam Towing Line, one of the defendants therein named, in the city of Albany, in said county, by delivering to and leaving with him personally a copy thereof.

Fees, $2.00.

JOHN WEMPLE, *Sheriff,*
By RICHARD PARR, *Deputy.*

Supreme Court, County of Columbia.

JOHN SALISBURY, Plaintiff,
against
SCHUYLER STEAM TOW-BOAT LINE, Defendant.

To the above-named defendant :

You are hereby required to answer the complaint of the plaintiff herein, a copy of which is hereto annexed, and to serve a copy of your answer on me at my office, in the city of Hudson, N. Y., within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will apply to the court for the relief demanded in the complaint.

S. L. MAGOUN,
Plaintiff's Attorney.

4 Supreme Court, County of Columbia.

JOHN SALISBURY, Plaintiff,
against
SCHUYLER STEAM TOW-BOAT LINE, Defendant.

The plaintiff, complaining, shows to this court upon information and belief—

I. That the defendant is a corporation created by and under the laws of this State, organized pursuant to an act of the Legislature entitled "An act to extend the operation and effect of the act passed February seventeenth, eighteen hundred and forty-eight, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes', passed April 23, 1864," and the acts amending the same.

II. That the said plaintiff, on the ninth day of October, 1876, was the owner of a barge called and known as the barge John T. Lee, of the burthen of two hundred and forty gross tons or thereabouts, and

which the said plaintiff used in and about his business in loading with brick and other property, and freighted therein such bricks and property for hire in transporting the same on the Hudson river; that said barge was worth the sum of thirty-five hundred dollars.

3. That said plaintiff had on board of said barge a quantity of furniture and clothing and other articles of the value of one hundred and thirty dollars; also a tool-chest with tools in same of the value of thirty-five dollars and an awning of the value of thirty-six dollars, all of which were the property of said plaintiff.

And further that said plaintiff had received on board of said barge at Schodack, in the county of Rensselaer, from one Edward Brosseau, one hundred and twenty-seven thousand brick to be carried in said barge from said Schodack to the city of New York on a charge to be paid to said plaintiff of one dollar and thirty-seven and a half cents for each thousand of said brick, and the
5 said brick were of the value of five hundred and seventy-one dollars and fifty cents.

III. That said defendant, on said ninth day of October, 1876, was the owner of a steamboat called the Niagara, which the defendant, by its agents and servants, employed in the towing of canal-boats, barges, and other vessels for hire.

IV. That on said ninth day of October, 1870, the said plaintiff employed the said defendant to tow his said barge, John T. Lee, having on board the said furniture, tools, awning, and other property, and loaded with said brick from New Baltimore, in the county of Greene, to the city and county of New York, of the value aforesaid, to be safely and securely towed by the said defendant and safely and securely delivered by the said defendant to the said plaintiff for certain reasonable reward to the said defendant in that behalf.

Yet the said defendant, not regarding its duty and undertaking in that behalf, so carelessly and negligently behaved and conducted the business so entrusted to it by its agents and servants that by and through the carelessness, negligence, and default of the said defendant in the premises, and its agents and servants, the said barge, with all its said freight and property on board, being in the charge and control and under the management of said defendant and its agents and servants, with a certain steamboat called the Niagara, towing the same at a certain point in the Hudson river near West Point, and then on or about the ninth day of October, 1876, caused and negligently, unskillfully, and carelessly suffered and permitted said barge, John T. Lee, to run upon the rocks and shore of said river and *and* thereby broke a hole in the bottom of said barge, and by such careless and unskillful conduct caused the said barge to sink and become a total loss, with all and singular said brick and other property therein and thereon, and the same were wholly lost to the said plaintiff, to wit, at Hudson, on the ninth day of October, 1876, to his damage the sum of forty-two hundred seventy-two dollars and fifty cents.

6 Wherefore the plaintiff demands judgment against the said defendant for the damages suffered by him as aforesaid, to the amount of forty-two hundred and seventy-two dollars and fifty

cents, with interest thereon from and after the ninth day of October, 1876, with the costs of this action.

S. L. MAGOUN,
Plaintiff's Attorney, Hudson.

COLUMBIA COUNTY, *ss:*

John Salisbury, being duly sworn, says that he is the plaintiff in this action; that the foregoing complaint is true to his own knowledge except as — those matters stated on information and belief, and as to those matters he believes it to be true.

JOHN SALISBURY.

Sworn to before me this 11th day of April, 1877.

SHERMAN VAN NESS,
Commissioner of Deeds, Hudson, N. Y.

Supreme Court.

JOHN SALISBURY
against
SCHUYLER STEAM TOW-BOAT LINE.

The defendant for answer to the complaint in this action—

First. Denies that it has any knowledge or information sufficient to form a belief whether the plaintiff was, on the 9th day of October, 1876, or at any other time, owner of the barge John T. Lee, and alleges, upon information and belief, that at the time of the alleged damage to said barge the same was mortgaged to Thomas E. Ferrier and Mathias Van Loan for more than its value, and that the said Ferrier and Van Loan claim and demand of this defendant that any damage to said barge resulting from the alleged cause of action in said complaint must be paid to them by virtue of mortgages held by them upon said barge.

7 Second. Denies, upon information and belief, that said barge was worth the sum of $3,500.

Third. Denies that it has any knowledge or information sufficient to form a belief whether the plaintiff had on board said barge at the time of said alleged damage the furniture, clothing, tool-chest, or awning mentioned in said complaint, and whether they were of the values therein alleged.

Fourth. Denies that it has any knowledge or information sufficient to form a belief whether the plaintiff had on board said barge the quantity of brick alleged in said complaint (or any brick) or whether the charge to be paid therefor was $1.37½ per thousand or any other sum, or whether said brick were of the value of $571.50.

Fifth. Denies that the defendant agreed safely and securely to tow said barge and safely and securely to deliver the same to the plaintiff, but alleges that said barge was received and towed by this defendant under and pursuant to an agreement made between this defendant and the plaintiff that said towing should be done at the risk of the master and owners of said barge.

Sixth. Denies that this defendant carelessly or negligently behaved,

or that it was guilty of any carelessness, negligence, or default in the towing of said barge, and also denies that it negligently, unskilfully, or carelessly suffered or caused or in any manner suffered or caused the alleged damages to said barge.

Seventh. Denies, upon information and belief, that the plaintiff suffered damages in the sum of $4,272.60.

Eighth. Alleges, upon information and belief, that the damage to the said barge, at the time alleged in sa-d -omplaint, was caused by the negligence and carelessness of the owners of the said barge.

Ninth. Alleges that after the alleged damage to said barge, to wit, on the 22nd day of November 1876, the plaintiff and this defendant entered into a written agreement, duly executed by them, whereby, for a valuable consideration, it was agreed between them to submit all questions between them touching the value of the said
8 barge and the damage caused to her by reason of the injuries alleged in said complaint to the arbitrament and determination of Thomas A. Lawler, of Jersey City, N. J., and William Hall, of Hudson, N. Y., whose decision and award should be final, binding, and conclusive on said parties as to said value at the time of said alleged damages; that the said agreement is in full force and effect, but that the said arbitrators have not yet made any decision or award thereupon.

WORTHINGTON FROTHINGHAM,
Defendant's Attorney.

ALBANY COUNTY, *ss:*

Thomas V. Wolcott, being sworn, says he is secretary of the defendant in this action; that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

THOMAS V. WOLCOTT.

Sworn to before me this 25th day of May, 1877.

MONROE CRANNELL,
Notary Public.

At a term of the circuit court held in and for the county of Columbia, at the court-house, in the city of Hudson, on the third Monday (20th day) of January, A. D. 1879.

Present: Hon. A. Melvin Osborn, justice.

Supreme Court.

JOHN SALISBURY
against
SCHUYLER'S STEAM TOW-BOAT LINE.

Jurors: Jay N. Preston, Allen Barstow, Leonard Miller, Philip H. Miller, Samuel Brown, B. F. Knickerbocker, Lewis Moore, Andrew Avery, Norman D. Hess, Stephen W. Clapper, Benjamin Sheldon, Russel Tremain.

1879, January 29.—The jury having been charged by the
9 court, they retired in the charge of a constable, duly sworn for that purpose, and being again returned into court January 30, 1879, say they find a verdict in favor of the plaintiff for the sum of three thousand four hundred and ninety-two dollars and twenty-three cents ($3,492.23).

CHARLES WHITBECK, *Clerk.*

(Copy.)

Supreme Court, County of Columbia.

JOHN SALISBURY, Plaintiff,
against
SCHUYLER STEAM TOW-BOAT LINE, Defendant.

The issues in this action having been brought on for trial before Mr. Justice Osborn and a jury at a circuit court held on the fourth Monday of January, 1879, and the issues having been tried and a verdict for the plaintiff having been duly rendered on the 30th day of January, 1879, for $3,492.23, and his costs having been adjusted at $378.30, and $742.09 for interest on said verdict being computed—

Now, on motion of S. L. Magoun, attorney for said plaintiff, it is adjudged that said plaintiff recover of said defendant $3,492.23, found by the jury, with $378.30 costs and $742.09 interest on said verdict, amounting in all to $4,612.62, for which the plaintiff shall have execution against said defendant.

Dated Hudson, August 15, 1882.

CHARLES WHITBECK, *Clerk.*

At a general term of the supreme court of the State of New York held in and for the third judicial department of said State, at the capitol, in the city of Albany, on the 23d day of January, 1883.

Present: Hon. Wm. L. Learned, presiding judge; Hon. Douglas Boardman, Hon. Augustus Bockes, associate justices.

10 JOHN SALISBURY
against
SCHUYLER'S STEAM TOW-BOAT LINE.

This cause having been brought to argument before this court upon an appeal from the judgment in this action on the verdict of a jury, entered in the office of the clerk of the county of Columbia, in favor of John Salisbury, plaintiff, against Schuyler Steamboat Line, defendant, for $4,612.62, damages and costs, on the 15th day of August, 1882, and also from the order of the court denying a motion for a new trial on the merits, made on the 8th day of March, 1879, and entered in the said clerk's office the 13th day of March, 1879, and upon hearing Worthington Frothingham, Esq., of counsel for the appellant, and Stephen L. Magoun, Esq., of counsel for the respondent, and due deliberation being thereupon had—

It is ordered that the said judgment and the said order be, and

the same are hereby, reversed and a new trial ordered, costs to abide the event.

JNO. LARKIN, *Clerk.*

(Copy.)

At a circuit court and special term of the supreme court, held at the court-house, in the city of Hudson, N. Y., in and for the county of Columbia, on the 14th day of April, 1884.

Present: Hon. T. R. Westbrook, justice.

JOHN SALISBURY
against
SCHUYLER STEAM TOW-BOAT LINE. } April 18, 1884.

Jurors: Henry C. Bradley, Norman Palmatier, Charles Becker, George H. Rockefeller, Jr., George Henderson, Thomas Phillips, Andrew Kittle, John Hatch, Charles Becker, Isaac Wherehouse, Charles Harroer, John Crawford.

11 April 26, 1884.—The jury, having been duly charged by the court, retired in charge of a constable duly sworn for that purpose, and being again returned into court (April 26, 1884) say they find for the plaintiff for $5,175.70. An extra allowance of five per cent. granted. Motion for new trial on the merits denied. Three months' stay granted to make case and exceptions.

[L. S.] WM. S. HALLENBECK, *Clerk.*

(A copy.)

STATE OF NEW YORK:

Supreme Court, County of Columbia.

JOHN SALISBURY
against
SCHUYLER STEAM TOW-BOAT LINE. } Judgment Oct. 11, 1884, at 10.30 o'clock a. m.

The issues in this action having been tried at a circuit court held at the court-house, in the city of Hudson, in and for said county, on the 26th day of April, 1884, before the Hon. T. R. Westbrook and a jury, and the jury having found a verdict for said plaintiff and against the said defendant herein for $5,175.70 damages, which verdict has been entered in the minutes of said court—

Now, on motion of Cady & Hoysradt, plaintiff's attorneys, it is hereby adjudged by the court that the plaintiff do recover of the said defendant the sum of $5,175.70, found by said jury, together with $1,184.67 for plaintiff's costs and disbursements as adjusted, amounting to the sum of $6,360.37, and that he have execution therefor.

WM. S. HALLENBECK, *Clerk.*

12 STATE OF NEW YORK:

Supreme Court, County of Columbia.

JOHN SALISBURY
against
SCHUYLER STEAM TOW-BOAT LINE.

The above-entitled cause came on for trial before Mr. Justice Westbrook and a jury, at the court-house, Hudson, Columbia county, Friday morning, April 18, 1884, and the following were all the proceedings had and all the evidence given.

Mr. Cady opened the cause of the plaintiff to the jury, and Mr. JAMES SMITH sworn for plaintiff:

I live in Greenbush.

Q. What was your business in October, 1876?

A. I was along with John Salisbury on the barge John T. Lee at that time.

Q. Was she taken in tow in that month by a steamer?

A. Yes, sir.

Q. What steamer was it that took her in tow?

A. The "Willie" had took her in tow first from Schodack creek.

Q. Where did he take her to?

A. New Baltimore.

Q. What then happened—where was she put in?

A. New Baltimore dock.

Q. What became of her?

A. We tied her up there that day until evening.

Q. What then?

A. Then we were taken out by the steamboat Winans and put on the tow of the Niagara.

Q. That is the tow-boat of the defendant, Schuyler Steam Tow-Boat Line?

A. Yes, sir.

Q. Who was with you when she was taken on?

A. Mr. Salisbury and Bruso.

Q. Mr. John Salisbury, the plaintiff?

A. Yes, sir.

Q. Was it his barge?

A. Yes, sir.

Q. Was she loaded?

A. Yes, sir.

13 Q. Loaded with what?

A. Brick.

Q. Do you know about how many?

A. About 124,000 to 126,000. Somewhere in that neighborhood.

Q. You was on her when she was taken in tow by the steamer Niagara?

A. Yes, sir.

Q. Who was on the barge at the time—John T. Lee?

A. Captain John Salisbury and Bruso—Samuel Bruso.

Q. Who and you were employed on the boat—Bruso?
A. Yes, sir.
Q. What was said between Captain Salisbury and the Winants, that took her and put her on the tow?

Objected to by defence.

The COURT: Merely for showing that the boat went to the tow.
Q. How did you happen to be attached to the Niagara; you did not move without anybody?
A. No, sir; we were taken off by the Winants, put on the east side of the tow, in the tail end of the tow.

The COURT:

Q. Whom did she belong to?
A. That I could not say.
Q. Don't you know in whose employment she was?
A. Schuyler Tow-Boat Company's.

Mr. MCLELLAN:

Q. How do you know that?
A. I know that from what Mr. Salisbury said at the time.

Mr. MCLELLAN: I move to strike that out.
Mr. ANDREWS: I move to strike out the question of the counsel.
The COURT: I will allow the evidence to stand for a moment. What the plaintiff said to him is no evidence if he knows it in no other way.
Mr. FROTHINGHAM: The question how we took her in the tow does not arise in the case.
Mr. ANDREWS: I want to know as part of the *res gestæ* in the case at the time she was taken in the tow.
The COURT: Certainly, you may prove that.

Q. What do you say occurred when she was taken in tow?
A. We were placed in the tow and made fast our boat to the tow—our head-lines and breast-lines.

14 The COURT:

Q. The conversation that took place between you and the captain, on the one part, and the managers of any other steamboat, on the other?
A. The steamboat came after us and took us to the tow; I was there when she came.

The COURT:

Q. How do you know she came after you?
A. She came after our barge.

The COURT:

Q. How do you know?
A. Because she took her to the tow.

Q. Anything said between the officers of the Niagara and of the barge John T. Lee as to where she should be placed?

A. No, sir; not that I heard.

Q. And did you have the selection of the place where you were to be put?

A. No, sir.

Q. You were taken to that spot and placed in the tow?

A. Yes, sir.

Q. The rear tier on the left-hand side?

A. Yes, sir; east side of the tow going down the river.

Q. That was about what time in the day or evening?

A. I should judge it was about midnight.

Q. And you went on then south towards New York—down the river?

A. Yes, sir.

Q. Who was on your barge when you started going down?

A. Mr. Salisbury and Brousseau and myself.

Q. And Salisbury continued on the barge how long?

A. Well, I should judge between three o'clock that morning. Probably a little earlier and probably a little later.

Q. Coutinued until he got to Athens?

A. Yes, sir.

Q. Then he got off?

A. Yes, sir.

Q. Then you and Brousseau went on without him?

A. Yes, sir.

Q. You went on all next day without any trouble?

A. Yes, sir.

Q. And how far did you go before anything occurred in the way of difficulty in your voyage?

A. About opposite West Point; a little below, I should judge.

Q. Either West Point or a little below. That is the first you noticed any trouble?

A. Yes, sir.

Q. You weren't on deck when it was first noticed?

A. No, sir.

Q. What did you observe first?

A. When I went on deck I saw Brousseau.

Q. What was the first thing you observed—what noise or report that attracted your attention before you went up above?

A. Mr. Brousseau called me out.

Q. What did he say?

A. He sung out "we were over on the rocks."

The COURT: What time was that?

A. Somewhere about midnight.

The COURT: That is, the second midnight?

A. Yes, sir.

Q. Do you know what day of the week it was that you started from New Baltimore?

A. I don't remember now.

Q. Do you know what day of the month it was?

A. No, sir. I think it was on Wednesday night, that night; I am not certain.

Q. On Wednesday night, that what happened when you left New Baltimore or the accident happened?

A. I think it was on Wednesday night that the accident happened.

Q. You heard this remark from Brousseau. What did you do then?

A. I ran out on deck.

Q. What did you say?

A. I saw Brousseau with a fender in his hand, held down alongside the barge.

Q. How near were you to the shore or to any rocks or anything that you could see?

A. Well, I think I could jump off, to run across the deck of the barge to the rocks and jump on the rocks.

Q. How was the night as to darkness and light?

A. It was not what you could say a real dark night; it was no moonlight night; it was a starry night; clear.

Q. How did that pass along? Brousseau, you say, was standing there with a fender between the boat and the rocks. How, further?

A. Then we went for a little ways along the rocks until
16 the tow fetched on the rocks. Our barge had struck; rather, when she struck she made a plunge in the water. I had run across the barge, and I hollered for Brousseau to follow me. I think she was going right down.

The COURT:

Q. Your boat struck the rocks?

A. Yes, sir.

Q. When you came up and saw Brousseau with the fender you were above or below the point at West Point?

A. I think we were just below.

Q. What do you mean by just below?

A. Just off West Point. We were to the east side of the river.

Q. It was not very different from right across?

A. No, sir.

Q. After you struck the rocks, what then?

A. Then when I ran I hollered to Brousseau for to come. When she had struck she made a terrible plunge in the water. I thought the boat was going right down, so I ran to jump on this light boat that was alongside her. The boat moved after she struck; she righted to again. I then ran to the water-gauge, and to see if the boat had made any water; she had not made any. Then I ran out, and when I went in again the water was over the gauge. The gauge in the cabin used to tell how many inches she had in; it ran down to the bottom of the boat; so many inches marked on it when the water came in. When we found out she was making water we lifted the hatches to see if we can find out where the water was coming. We heard the water running in, so the water was running in very strong; did not know what we could do for it

just then, and then I thought of a canvas we had aboard. I got that out. We got four lines, one for each corner. I happened to think of a canvas on board. We took the canvas and tied a line to each end of it and four corners of it, that I tied it down under the bow of our boat. When we got it down and made it fast the suction of the water to the bottom of the boat drawed the water in and it closed the leak; just then we started to pump.

Q. How near to the place where you had been when you first came out?

A. I could not tell.

17 Q. Tell within five miles.

A. I could not say.

Q. Could not you form any judgment?

A. Probably may have moved along a mile or a half mile; we kept moving all along. We had not stopped to be dead still at any time; kept moving a little when we were on the rocks.

Q. Was that when you struck above or below Garrison's?

A. I am not much acquainted with the river there.

Q. What further occurred?

A. Then we started our pumps and pumped the water out, one at a time.

Q. Did you have any help from the officers and men of the other boats in fastening your canvas?

A. Some man helped us to shove it down; only one man, that was on a canal-boat alongside us.

Q. When you first discovered it on the rocks how many boats were in that hind tier?

A. I could not say; I don't know how many boats; some three or four lengths.

Q. I mean in that very hind tier.

A. Four boats, I think, was in that.

Q. Were they attached to you when you struck?

A. Yes, sir; we were fastened to them.

The COURT:

Q. Four boats without you or with you?

A. Four with us.

The COURT:

Q. You were the eastern boat?

A. Yes, sir.

Q. What occurred? You had got your canvas fastened and went to pump, as you have stated?

A. Then we were taken in tow again.

The COURT:

Q. Were you dropped from the tow?

A. The tow had broken in two; the steamboat came back almost alongside, a little ways off.

The COURT:

Q. The tow had broken in while you were being on the rocks?

A. I don't know that. I could not see anything of the steamboat.

Q. The steamboat was out of sight when you came up?

18 A. Yes, sir; after we got the canvas on we started the pumps. This man helped us along, and we went down below, tried to cut away the ceiling on top of the timbers separate from the bottom. We tried to cut away to see if we could not find the leak. After we got some of the water out we found the leak. Then we saw where it was. The leak was right in the bottom. It was not exactly right in the bottom; off a little ways from the keelsome; about two feet from the keelsome.

Q. What is the keelsome?

A. That is the timber that runs through the centre of the boat.

Q. How near the bow of the boat was the hole?

A. I should think about fifteen feet from the bow of the boat; probably a little more or less.

Q. You say the boat came back and took you in the tow again?

A. Yes, sir.

Q. It took in the other vessels that were by the side of you?

A. Yes, sir.

Q. Were other vessels in addition in front of you that broke loose also?

A. We were together. What was left of the tow moved right along down the river until she came back and made all fast again, and then we had rounded in the river.

Q. Did you cut loose from the boats that broke way?

A. No, sir.

The COURT:

Q. How many tiers broke loose?

A. About four tiers; three or four boats ahead of us, and we had all drifted along after the rest of the tow.

Q. That is, in the broken part was about four tiers ahead of you?

A. Yes, sir.

Q. You went on that way; the boat had picked you up; what occurred then?

A. Then the tow had rounded in the river; had to pull us to the westward to take us off from the rocks. While we were going around we were going along nicely, while the canvas stayed there; while we rounded to our canvas worked off, and then she filled in a very few moments.

Q. To get you into the tow she had to pull you up the river?

A. Yes, sir.

19 Q. And then in rounding about to get down the river again the canvas came off?

A. Yes, sir; it worked off—did not come off where we had it made fast, but it came off so the water came in.

Q. How far were you below West Point when that occurred?

A. We were off from the chemical works.
Q. How far below West Point?
A. That is a little below West Point—not very far; I could not say how far for certain.
Q. Do you know how many miles?
A. No, sir; I could not say how many miles.
Q. Could you say whether it was as much as one mile?
A. I would not like to say.
Q. Have not got any judgment about it?
A. No, sir.
Q. Then what occurred—that canvas came off, what then?
A. Well, then our boat filled in about ten or fifteen minutes; we were cut loose from the tow and let her go; I say the boat had been cut from the tow.
Q. Who cut it?
A. Men from the other boat.
Q. And you sank how quickly after that?
A. About ten or fifteen minutes, I should judge.
Q. Where were you then in respect to the two sides of the river?
A. We were on the eastern side at that time—that is, pretty well out in the river at that time.
Q. At the time you sank?
A. Yes, sir; almost you may say in the middle of the river; of course, we were on the eastern side then, same as we had been.
Q. You know who the person was that helped you fasten your canvas under your boat?
A. I could not say.
Q. Do you know which boat he came from?
A. I know he came from a boat alongside; I have not got the name of that boat.
Q. You don't know the name of the man?
A. No, sir.
Q. Was he an officer of that boat?
A. He was supposed to be captain—he said he was, at least.
Q. Did he help you along afterward?
A. Helped us along all the way through; he did not help us pump; he was helping one of us in the hold, and tried to cut a way to find the leak.
Q. Advise you how to manage it?
A. Yes, sir.

Cross-examination.

By Mr. FROTHINGHAM:

Q. What is your business now?
A. Driving team.
Q. In what year were you born?
A. 1855, 17th of March.
Q. So that when this accident occurred you weren't 21 years of age?

A. That I don't really know; I did not really count up the time at that time.

Q. How is the fact—how old were you when this accident occurred?

A. I was about 21 years.

Q. You were in your 21st year?

A. Yes, sir.

Q. When were you first employed on the John T. Lee?

A. About a month previous to that time.

Q. What had been your business before that?

A. Brick-yarding.

Q. Then you had the experience of only one month in boating at the time this accident occurred?

A. Nothing more than I have always been around small boats.

Q. Was that your experience in boating on the Hudson between New Baltimore and New York?

A. Yes, sir; only one month.

Q. During that time how many trips had you made?

A. Second or third, I don't remember which.

Q. What capacity were you employed on the John T. Lee?

A. I was first hand on the John T. Lee at that time.

Q. No other hand on the boat besides you?

A. Young man Brousseau.

Q. He was employed as cook?

A. Yes, sir.

Q. How old was he?

A. About the same age.

Q. Not under 21 years old at that time?

A. No, sir.

Q. Do you know when he first came aboard of the Lee?

A. He came aboard that trip.

21 Q. The same trip you did?

A. No, sir; that trip.

Q. The trip on which this accident occurred?

A. Yes, sir.

Q. Previous to that had he been employed in the brick yard?

A. He always worked in the brick yard.

Q. That was his first experience as a boatman?

A. He had gone up and down the river before with his uncle.

Q. On a pleasure trip?

A. Yes, sir.

Q. As a boatman navigating the river, that was his first trip?

A. Yes, sir.

Q. Had you any familiarity with the river before that time—with the shores and the currents and the tide?

A. Not much more than around Baltimore.

Q. You had no experience whatever with the river down in the neighborhood of West Point?

A. No, sir.

Q. Did you know anything of Mr. Salisbury having sent word to be towed?

A. Nothing more than what he had told me.

Q. You knew nothing whatever of any arrangement for towing except what he told you?

A. No, sir; I do not.

Q. How long were you lying at the dock at New Baltimore?

A. I should judge we got there some time in the afternoon. I could not say about what time it was, now.

Q. During that time did the steamboat "Carrie" come after you, picking you up to put you in the tow of the steamboat "Belle"?

A. Yes, sir; she came there.

Q. At that time was the captain aboard when the "Carrie" came after you?

A. No, sir; we told the captain of the "Carrie" that Mr. Salisbury was not there.

Q. Did the captain of the "Carrie" tell you he would not take you without the captain was aboard?

A. No, sir.

Q. About what time was that you told the captain of the "Carrie" that Salisbury was not there?

A. I told you that the captain was not and we were waiting for him to come; he told us to wait that night; to come and he would be there.

22 Q. Then afterward did you make any signals to any other boat to take you?

A. Not that I know of.

Q. You did not know that a steamboat by the name of "Winans" came to pick you up?

A. Yes, sir.

Q. To put you in the tow. Was there a vacancy in the tier where they put you?

A. Yes, sir.

Q. They put you on the last tier behind another boat where there was a vacancy?

A. Yes, sir.

Q. Did you and Capt. Salisbury make the boat fast yourself?

A. Yes, sir.

Q. With your own lines?

A. Yes, sir.

Q. How many lines did you use for that purpose?

A. I think we had two ahead, three abreast, and then a stern line.

Q. Those your own lines?

A. Yes, sir.

Q. Did you know it was the practice of boatmen to furnish their own lines?

A. Yes, sir; so far as I knew.

Q. You proceeded all right in that position down the river as far as Athens?

A. Yes, sir.

Q. Who was master of that boat?

A. Capt. Salisbury, of the John T. Lee.

Q. He was the captain and master?

A. Yes, sir.

Q. And there was no one else aboard the boat except Salisbury, yourself, and Brousseau?

A. No, sir.

Q. Did he then take the small boat belonging to your barge to go ashore at Athens?

A. Yes, sir.

Q. Leaving you without a captain?

A. Yes, sir.

Q. You had no captain during the trip?

A. No, sir.

Q. So that the boat was in the charge of yourself and Brousseau solely?

A. Yes, sir.

Q. You proceeded down the river to near West Point?

A. Yes, sir.

Q. At that time you weren't familiar with the localities there?

A. No, sir.

Q. Was it night?

A. Yes, sir.

Q. It was night when you left also—when Salisbury left at Athens?

A. Yes, sir; the same night we were took in tow.

23 Q. You were without a small boat during the rest of the trip?

A. Yes, sir.

Q. Did you know the localities, the places along there, at all at that time?

A. No, sir; not along there I did not.

Q. About 12 o'clock that night were you on deck?

A. Yes, sir.

Q. And that time did you see the steamer Niagara ahead of you?

A. Yes, sir.

Q. Twenty-four hours did it take you to go from New Baltimore to that point?

A. Might took us a little longer.

Q. Do you know the distance between those two points, New Baltimore and West Point?

A. I should judge about 84 miles.

Q. Took you 24 hours and over to go that 84 miles?

A. Yes, sir; I think it did.

Q. At this time, when you were on deck of this boat and saw the Niagara ahead of you, you were all right in your tow?

A. Yes, sir.

Q. Did you then go below?

A. Yes, sir.

Q. When you went below was Brousseau below?

A. Yes, sir.

Q. Then from the time you left your boat, when you saw the steamer, up to the time of the accident you both were below?

A. No, sir.

Q. Where were you from the time that you went below after having seen the steamer in position up to the time you first heard of the accident; were you and Brousseau below?

A. No, sir.

Q. Were you below?

A. Not until the accident happened.

Q. When did you go above?

A. When Brousseau hollered to me.

Q. How long after Brousseau called to you did the accident happen?

A. I could not say how long; it might have been 3 or 4 minutes; might have been 5; might have been 10.

Q. Might have been half an hour?

A. I would not swear to that, or I would not say it did.

24 Q. At the time you went below the boats had not broken apart?

A. No, sir.

Q. They had broken apart when you were below?

A. When I came back.

Q. When you were below had the boats broken apart in the tow?

A. That I could not tell.

Q. When you first came upon deck did you look for the steamer?

A. I did.

Q. Did you find that the steamer was out of sight?

A. Yes, sir.

Q. Then she had got out of sight while you were below?

A. Yes, sir.

Q. Can you form any judgment as to the time that you were below, any nearer than you have already stated?

A. No, sir; I could not.

Q. At all events you were below while the boat was passing out of sight?

A. Yes, sir.

Q. When you first came upon deck what did you see?

A. I saw Brousseau with this fender in his hand alongside the barge.

Q. Did you know where you were then?

A. I know we were a little ways off from West Point; we could see West Point.

Q. Which way?

A. It stood right off in that way, to the westward from where we were.

Q. How did you know it was West Point?

A. I had known West Point before that.

Q. It was in the night-time?

A. Yes, sir.

Q. Did you recognize West Point?

A. Yes, sir.

Q. Did you see any buildings there?

A. Yes, sir.

Q. What buildings were they?

A. That I could not say.
Q. Did you see the hotel there?
A. I did not take any notice of the hotel.
Q. What did you see at West Point that made you recognize it?
A. West Point is a high place there; most anybody can recognize it.
Q. Did you recognize it only because it was a high place?
A. Yes, sir.
25 Q. You saw nothing else except the high place there?
A. That is all.
Q. Have you seen it since?
A. Yes, sir.
Q. Did you see the hotel there since?
A. I was not never near it.
Q. You saw Brousseau with a fender in his hand?
A. Yes, sir.
Q. Did he use the fender?
A. Well, I told him it was no use holding the fender there.
Q. And he did not use the fender?
A. Not afterward; no, sir.
Q. Were you sworn before—twice before—in this action?
A. Yes, sir.
Q. On the last trial did you swear that he did use the fender?
A. I might have sworn that he used the fender; that was using it, to have it there.
Q. Did you swear on the last trial that he put the fender overboard and held it there?
A. Yes, sir.
Q. Such is not the fact?
A. I say so still.
Q. You say that he did use it?
A. Yes, sir.
Q. In what manner did he use it?
A. He held it hanging over the side, and the bottom part touched the water.
Q. Without touching the water?
A. It was touching the water, I think.
Q. Then you say you drifted along for how long before you struck the rocks?
A. That I could not say.
Q. After you came upon the deck?
A. I could not say; some minutes; probably ten or fifteen minutes.
Q. Before you struck the rocks?
A. Yes, sir.
Q. After you got up out of the cabin of the boat?
A. Yes, sir.
Q. How long was it before you discovered any water coming into the boat?
A. Probably it was ten minutes; might have been a little more or little less.

Q. After the boat struck a rock?
A. I did not say exactly.
Q. About that?
A. Somewhere about in that time; might have been less; might have been more.
26 Q. When you went down below did you look for the hole?
A. Yes, sir.
Q. And did you find a hole there near as large as a good-sized stove-pipe?
A. Yes, sir; it was not a round hole. I don't believe I ever said it was a round hole; it was about that large; crushed in the boat (side); not bulging right straight up.
Q. You think that hole had been there ten or fifteen minutes before you discovered the water in the boat?
A. It may have been less or may have been a little more; I did not say which; you can't tell exactly to the time in a place of that time when you struck. I said I was going in and out, and told Brousseau she had not made any water; when I went it was over the gauge.
Q. For ten or fifteen minutes, as near as you can estimate, there was no water in the boat that you could discover?
A. Might have been five minutes.
Q. As near as you can judge?
A. I could not say certain what time it was; time passed very quick there; sometimes very long.
Q. When you and Brousseau knew of the boat's striking you ran and jumped on the other boat?
A. Yes, sir.
Q. How long after you came back to your own boat?
A. I came right away; the boat squared up right away.
Q. Then what did you do?
A. That was the first thing I done—went and looked at the water-gauge.
Q. You found the water coming in?
A. Not at that time; the water had not reached the gauge at that time.
Q. How far was the bottom of the gauge above the bottom of the boat?
A. That I could not see; I never saw the bottom of the gauge.
Q. What kind of gauge was it?
A. It had a string on it used right down through, and there was a kind of wiper.
Q. So any water coming into the boat was to be indicated by the gauge?
A. Yes, sir.
Q. Then what did you do?
A. After I had discovered the water I went back on the deck and told Brousseau there was no water in. I stayed
27 there a few minutes; I ran back to see myself. I could not say for certain whether it was me or him. I said she was way over the gauge.

Q. Then what did you do?

A. I went and got this canvas, and we got a few of the other men off the other boat to shove the canvas right over the bow of the boat and tie it to the deck and the four corners of the canvas.

Q. Then did you go to the pumps?

A. Yes, sir.

Q. Pump the water entirely out of the boat?

A. I don't believe we pumped it out entirely; so we could work forward in the boat.

Q. Pump it nearly out?

A. Yes, sir.

Q. How long did you pump?

A. I should judge we pumped almost two hours.

Q. By that time you got the water out of the boat?

A. Almost out.

Q. Did the steamer come back?

A. Yes, sir.

Q. And took up the tow again where it had broken apart?

A. Yes, sir.

Q. Made it fast, just as it was before?

A. Yes, sir.

Q. And proceeded on the way?

A. Yes, sir.

Q. Did you make any endeavors to fill that hole?

A. I did.

Q. Did you fill it—did you put any pillow in it?

A. I took the pillow down with me, and stamped it down in the hole after we cut this off.

Q. Did you testify to that on the former trial?

A. I don't know.

Q. Did you not swear on the former trial you did not do anything of that kind?

A. I don't believe I did.

Q. You are sure you put the pillow in there at that time?

A. Yes, sir.

Q. Had you cut away the ceiling at that time?

A. I had.

Q. When was it that you put that pillow in there?

A. It was just about the time we were going all right, after we had the canvas. The water came in a little; I packed the pillow in there.

28 Q. Before or after you put the canvas on?

A. After we put the canvas on.

Q. How did you fix it?

A. I stuffed the pillow down—packed it down with my foot.

Q. Did you keep the pumps going all the time after that?

A. Yes, sir.

Q. So you were pumping continuously for two hours?

A. About that.

Q. You were made fast to the tow again. How far did you proceed?

A. I supposed we turned right around in the river there.
Q. Then you went down as far as the chemical works?
A. Yes, sir.
Q. How far are the chemical works below West Point?
A. I could not say.
Q. About how far?
A. Might have been a mile or a half mile.
Q. Don't know any distance along there?
A. No, sir.
Q. You were in the tow of the boat all the time after you were made fast?
A. Yes, sir.
Q. You had some lights aboard?
A. Yes, sir.
Q. When you were in the tow?
A. Yes, sir.
Q. How many lights?
A. We had — in our cabin and one in the wheel-house.
Q. White light in your cabin, a white light in your wheel-house?
A. Yes, sir.
Q. Wheel-house right over the cabin?
A. Yes, sir.
Q. So that one light was above the other?
A. Yes, sir.
Q. You kept those lights all the time?
A. Yes, sir.
Q. During the time you were below were those lights up in that way?
A. Yes, sir.
Q. Had you no other lights on your boat than those?
A. No, sir.
Q. No other lights visible?
A. No, sir.
Q. Did you help put these brick aboard?
A. I did.
Q. Did you count them?
A. No, sir; we did not count them.
Q. How do you know the number of bricks that were aboard?
A. From what we had turned out before.
29 Q. When before?
A. On the former trip.
Q. How many did you take on the former trip?
A. I think we had on the former trip in the neighborhood of 125,000.
Q. How did you know that?
A. We counted them in New York.
Q. Whom by; you?
A. By me and Mr. Salisbury. We counted the tiers.
Q. Can you tell, within one or two or three thousand, how many bricks you had on?
A. Yes, sir.

Q. How many did you have on?
A. Some 124,000 to 126,000 brick.
Q. At the last trial how many brick there were aboard?
A. Not that I know of.
Q. Did you not swear "I suppose about 120,000"?
A. No, sir; I did not; not that I know of.
Q. If you did so state, which was correct?
A. I think we turned out in the former trip to that 124,000 or 125,000.
Q. Can you swear within 5,000 of how many brick there were in that boat?
A. I can't swear positive; no, sir.
Q. So you don't know exactly how many brick there were?
A. No, sir; I could not swear exactly. I did not count them.
Q. There may have been 130,000, for aught you know?
A. Yes, sir.
Q. You were made fast to the tow; you were, then, as you have said, all right; you pumped the water out so that it was below your keelsome?
A. Yes, sir.
Q. What did you then do?
A. Then we commenced to cut away.
Q. After you had been made fast to the tow?
A. One of us worked the pump all the time, and this man near to us was below helping to cut away to find this hole—just exactly where it was.
Q. That was after you had been made fast?
A. I believe it was. I could not say whether we were made fast then or not.
30 Q. After you were made fast to the tow you were all right, were you?
A. We were all right after we made fast.
Q. What did you do after that?
A. Kept on working to our pumps for about two hours.
Q. During all that time the boat was drawing you through the water?
A. Yes, sir.
Q. It was about two hours after you had been made fast that you sank?
A. I should judge that it might have been a little more.
Q. I think you said Mr. Salisbury helped make fast the boat when you were put in the tow?
A. Yes, sir.
Q. Did you not know what the tide was on this occasion when this accident occurred?
A. No, sir; I did not know of my own knowledge.
Q. Did not know which way it was running?
A. No, sir.
Q. Did not know which way the wind was blowing?
A. The wind, I believe, was a little off the westward.
Q. Did you know it was?

A. Yes, sir.

Q. I want the time as near as you can state it. "How long was Brousseau there?" Did you give this testimony on the former trial: "How long was Brousseau there, and what did you do before the boat struck? I could not do anything" (reading from manuscript).

Mr. ANDREWS: We object, as we have no verification.

Q. Was this testimony given on the former trial: "How long was he there before you felt it strike something? A. It was quite some time; I could not swear positive to that. Q. In your judgment, the best recollection? A. Probably an half hour." Did you give such testimony on the former trial?

A. I might have, just the same as I had now. I might have said ten to fifteen minutes or a half hour.

Q. Whether it was probably an half hour?

A. I could not say for certain. I don't believe I said that.

Q. Could it have been an half hour, in your judgment?

A. I don't think it was at the time—then you can't tell when you are in trouble.

31 Q. Do you recollect whether the court asked you, "After you went out?" and you said, "Yes, a half hour." "A half hour after you went out?" You said, "Yes"?

A. I could not say.

Q. Is it true if you did so swear?

A. I don't believe it is.

Q. Then it could not have been a half hour?

A. No, sir.

Q. So, if you so stated on the former trial, you were mistaken?

A. I think I was, if it was a half hour for certain.

Q. Was not this matter more fresh in your recollection then than it is now?

A. No, sir; I don't believe I ever said it so.

Q. Have you talked it over with anybody?

A. Nothing more than I heard my testimony read.

Q. Where was that?

A. Mr. Cady read it for me.

Q. From what?

A. From the former trial.

Q. Did you refresh your recollection from the printed book?

A. Yes, sir.

Q. Did he read you the minutes of the last trial from the manuscript?

A. No, sir.

Q. Who told you to put those lights on the boat?

A. Mr. Salisbury.

Q. Told you to put those two lights in the position you placed them in?

A. Yes, sir.

Q. You made no attempt during all this time to detach your boat from the others?

A. No, sir.
Q. Were you advised to put your wheel about?
A. Yes, sir.
Q. Did you do it?
A. Yes, sir.
Q. Who advised you to do that?
A. Captain on one of the other boats, to throw one wheel off and lash it on, so she would go for the shore after she was cut.
Q. Were you considerably excited during this time, at the time of the accident?
A. Yes, sir.
Q. Did you make any signals to the steamer after you found you were detached?
A. We hollered all the time.
32 Q. Did you make any signals?
A. Nothing more than hollering.
Q. What good did that do; the boat was then clear from you, out of sight?
A. We hollered out of sight, and we hollered when the boat was close to us; the boat was close to us at one time.
Q. That was after she came back?
A. Yes, sir.

The COURT:

Q. You apprised the boat of your condition?
A. When we found we were cast adrift, all on board of all the boats along the shore, we were all hollering from one to the other.

The COURT:

Q. After the boat came to and close by you, whether you apprised the steamer of your position.
A. Yes, sir.

The COURT:

Q. Whom did you tell?
A. All hands was singing about there; she came right back, sung out then for the captain; I asked the captain and told him we were aleak and sinking, and wanted to know if he could not help us; he told us to help ourselves; he says, "I can't help you now;" I could not say whether he said it exactly.

The COURT:

Q. Was that after you put the canvas on?
A. Yes, sir.

The COURT:

Q. Then he came back for you?
A. Yes, sir; I sung out in that way to the direction of his boat.
Q. After you had got this canvas on and the steamer came back to make the tow?
A. Yes, sir.
Q. And attached to the end that was broken off?

A. Yes, sir.

Q. How many boats between you and the steamboat at that time?

A. When the steamboat came back she almost rounded to alongside of us on the outside.

Q. How many boats were there between you and the steamer when she came back?

A. There may have been 50 or 60 between us that time.

Q. Then you were hollering at that time?

A. Yes, sir; I was.

33 Q. They were all hollering?

A. Yes, sir.

Q. How do you know the captain answered you?

A. The answer came from that way.

Q. That was all you know about it?

A. Yes, sir.

Q. Did not the mate come back to you?

A. I don't know whether he did or not.

Q. That was before you were reattached to the tow or at the time you were reattached that you called to the captain?

A. I could not say whether she was reattached or whether she was or not.

Q. You could not tell what time that was?

A. No, sir.

The COURT:

Q. Tell us exactly what you said to the steamboat when it came back to you and exactly what they said in answer to you and what you said.

A. I supposed the steamboat was attaching all to her tow at that time, and when it came back she had rounded to in the river, so that would fetch her almost with the tail end of the tow by holding her hawsers to the westward of us, when I sung out to the captain and said we were sinking and asked him if he could not help us, and the answer came back: "I can't help you now."

Q. You sung out to somebody?

A. I sung out to the captain of the Niagara. "Captain on board the Niagara," I says, "we are sinking; we have got a hole in us."

Q. Did you swear to that on the former trial?

A. I believe I did on the first testimony I gave.

Q. Was that before or after you had the canvas on?

A. I think we had the canvas on.

Q. You are sure of that now?

A. Yes, sir; I am pretty sure I stated that on the former testimony I gave.

Q. Did Mr. Cady read that to you the other day?

A. I don't know whether he did or not.

Q. You think at that time there may have been fifty or sixty boats between you?

A. There might have been.

The COURT:

Q. Anything more said that time; did you tell him what you had done?

A. No, sir.

34 The COURT:

Q. All that you said: "We are sinking; you must help us," and the answer was: "No; not now"?

A. "No; I can't help you now."

Q. You don't know that was the captain that answered you?

A. I could not say, only the answer came from that way.

Q. You could not say whether it was the captain or not?

A. No, sir.

Q. Had not there been somebody before that aboard your boat inquiring about it?

A. No, sir.

Q. You don't know whether that was the mate or not?

A. No, sir; I did not see anybody.

Q. Did you say to anybody that your boat was alight?

A. No, sir.

Q. At that time was the steamer progressing about her usual time—usual distance—after you were attached to the tow, and was moving about two hours, as you say?

A. I should judge so; she was making the usual distance; you can't tell how fast they go.

Q. You say all the other men at the time you called out to help—all the others on the boats were calling at the same time?

A. All hollering.

Q. Everybody was hollering on the boats?

A. Yes, sir.

The COURT:

Q. Before your boat was made fast and before she had gone—proceeded down the river with the tow—was any other information that you knew of given to the captain of the Niagara as to your actual condition?

A. No, sir.

The COURT:

Q. Simply you said you were sinking and in a sinking condition?

A. Yes, sir; that was all; not that I know anything about.

Q. Was the testimony that was read from the printed book by Mr. Cady correct, in your judgment?

A. That I could not say; I did not pay much attention.

Q. On the former trial did you answer this, "For a time we got all the water pumped out below the keelsome of the boat; when the steamboat came back I hollered for the captain"?

A. Yes, sir; something like that.

35 Q. So the time you hollered you had all the water pumped out?

A. Almost all the water; we had not all the water pumped out at any time.

Q. You were sworn on the two former trials?

A. Yes, sir.

Q. The printed book contains your testimony on the first trial?

A. That I don't know.

Q. On the second trial was not you asked this question, "What took place after this when you had asked the captain of the Niagara; how do you know it was the captain of the Niagara?" Did not you answer, "I could not say no more than answer came when I gave the alarm; it came from the Niagara—in that direction—and then we were pulled from the eastward to the westward; we had been going alight; we had the water almost pumped out"?

A. I believe I did.

Q. That is true?

A. I think it is.

Q. It is a fact that you hollered you were sinking when the water was actually pumped out?

A. Yes, sir.

Q. How was this barge loaded—in what manner; where were these brick?

A. Mostly all on deck.

Q. How many in the hold—what proportion in the hold?

A. About 7,000, I should judge, in the hold.

Q. All the balance on deck?

A. Yes, sir.

Q. Was she loaded heavier on the stern or the bow?

A. Most generally always a little heavier on the stern.

Q. How much water did she draw?

A. I should judge between six and seven feet. I could not say certain.

Q. You don't know how much water?

A. No, sir; I do not.

Q. In regard to the time when the "Carrie" came after you at New Baltimore, why did not you go at that time?

A. We did not have any orders to go at that time.

Q. Was it because your captain was not aboard?

A. Yes, sir.

Q. You were *where* you were not to go without your captain?

A. Yes, sir.

Q. You say he went ashore in the night-time?

A. At Athens.

36 Q. You don't know the officers on board the Niagara knew that he went ashore?

A. I do not know.

Q. It was in the night-time that he went ashore?

A. Yes, sir.

Q. You do not know of your own knowledge that this Niagara belongs to the defendant?

A. Nothing more than what I have heard everybody say.

Q. You don't know anything about the ownership of these boats yourself?

A. No, sir.

Q. You don't know in whose employ they were except hearsay—any of these boats?

A. No, sir.

Q. After you came upon deck how long was Brousseau holding that fender?

A. He was holding for a little while; not very long.

Q. How long?

A. I could not say for certain.

Q. Was he holding the fender when the boat struck?

A. No, sir; I don't believe he was; I don't think he was.

Q. What had he done with it?

A. Thrown it on deck.

Q. Can you tell how long he had stopped holding that fender at the time the boat struck?

A. I could not say.

Q. Did you testify on the former trial that you should judge it was about ten or fifteen minutes?

A. I do not know.

Q. Is that correct, if you did?

A. I guess it must have been.

Q. Is that your present estimate of the time?

A. I believe it was.

Redirect examination.

By Mr. CADY:

Q. Did any of the lines by which your boat was attached to the tow of the Niagara break?

A. No, sir.

Q. At any time?

A. No, sir.

Q. How was your boat separated from the rest of the tow at the time it sank?

A. They were cut.

Q. The lines were cut?

A. Yes, sir.

37 Q. By men with axes?

A. Yes, sir.

Q. Whereabouts were they cut—on your boat or on any boat?

A. On their boat, to which we were attached to.

Q. You don't mean to say that at the time you called out to the Niagara that you were in a sinking condition that the Niagara was away from you the distance of 50 or 60 boats?

A. No, sir.

Q. About how far from you was the Niagara at any time you called out?

A. She was right off from one side of the tow.

Q. She was to the west of you?

A. Yes, sir.

Q. And the tow at that point was 4 or 5 boats wide?

A. Yes, sir; she was on the outside, in the river.

Q. Why did you use the expression, "We are in a sinking condition," when you called out to the Niagara?

A. That we might save the barge if they would pull us ashore; take us some place; we supposed the steamboat would take us to some place where the barge would be safe; that is what we hollered for.

Q. That hole, you say, in the bottom of the boat was about two feet from the keelsome?

A. Yes, sir; from the keelsome.

Q. Was it in between the timbers of the boat of the Lee?

A. You could not see the timbers in the boat when you cut down.

Q. When you did cut down?

A. Yes, sir.

Q. And between two sets of timbers?

A. Where we cut the timbers had run from the keelsome to the deck on the sides; from midships up to the wing.

Q. What do you mean when you say that the hole was a large round, as you describe it; you don't mean there was a clear round hole?

A. No, sir; the hole was kind of pushed.

Q. That the plank was pushed in?

A. Yes, sir.

Q. And the space in the plank of the dimensions you have described?

A. Yes, sir.

Q. On the passage down, the day before the accident happened, did you look at the gauge at all to see whether the boat was making water?

A. Yes, sir.

38 Q. How was it?

A. There was no water there.

Q. She did not leak?

A. No.

Q. Any excitement or shouting on that tow that night about this time of the accident occurring?

A. Yes, sir.

Q. On other boats in the tow?

A. Yes, sir.

Q. What did Capt. Salisbury say to you when he left the boat at New Baltimore before you went on the tow?

Mr. FROTHINGHAM: We object to it.

Mr. CADY: They went into it themselves when they asked what Capt. Salisbury said to him with respect to leaving New Baltimore.

Q. What was said by Capt. Salisbury?

Objected to by Mr. Frothingham; has not been called out; as improper.

The COURT: What did captain tell you?

A. I can't tell you, because he did not leave us in Baltimore.

Q. Whenever he did leave you, wherever it was.

A. That was at Burn's dock.

Q. What did he say?

Mr. FROTHINGHAM: We object to that; we have not gone into that; that is incompetent.

The COURT: Do you know to what conversation that the captain there inquired?

A. He was asking me now what he said to me with regard to taking the tow.

DEFENDANT'S COUNSEL: We have not asked him a word about that.

PLAINTIFF'S COUNSEL: No matter what is was.

The COURT: Mr. Frothingham asked him the question why he did not go with the Carrie. He said that the captain was not on board, and then there was a question asked him what his instructions were; whether those were the instructions which he received from the captain. Now, then, to that he answered, Yes. They are asking him what the captain said to him in giving him instructions.

The COURT:

Q. What did the captain say to you in giving you the instructions to which you testified in regard to not going when he was absent?

DEFENDANT'S COUNSEL: We object to it as improper.

Objection overruled. Exception by defendant's counsel.

39 A. He told me the day before he left that he had to go to Catskill on a lawsuit, and he told me he would be back that evening again and have us to wait for him until he would come to New Baltimore.

Q. Was this rock on which the Lee struck that night a sunken rock or did it project above the water?

A. It was a sunken rock; it must have been a sunken rock.

Defendant's counsel object to that answer.

A. I could not say what kind of a rock it was.

The COURT: Whether it was a rock above or below water?

A. Below water.

The COURT: Any part of it above the water?

A. It was all rock along there; it may have been all rock along where we were. I could not tell whether it was a branch over the water or not; sometimes the rock runs out quite a ways.

The COURT: The sunken rock means rock entirely covered by water?

A. I could not say whether it was a sunken one.

Q. Did you endeavor at any time after you discovered that you were near the shore that night to keep any track of the time the various events occupied?

A. No, sir.
Q. Did not look at any watch or clock?
A. No, sir; not from the time I went in the cabin first.
Q. You were a good deal excited by the situation?
A. I was.

Recross-examination.

By Mr. FROTHINGHAM:

Q. Your lines were cut by men on the other canal-boats?
A. Yes, sir.
Q. Did you give them orders not to cut them?
A. I did once; yes, sir; the first time.
Q. Men on the other boats in tow?
A. I believe so.
Q. That cut them. When I ask you how many, what distance you were from the Niagara when you hollered, and you said there may have been 50 or 60 boats between you, what did you mean? I asked you when you hollered to the captain how far you were from the Niagara at the time, and you said there may have been 50 or 60 boats between you. What did you mean by that answer?
A. I meant she might have been rounded to in the river.
Q. The tow was all doubled up?
A. I said it may have been so.
Q. All these boats may have been between you and the Niagara?
A. Yes, sir.
Q. When they were all hollering?
A. Yes, sir.
Q. You say your own ropes did not break. You do not know of your own knowledge, irrespective of what you have been told, whether any ropes broke?
A. No, sir.
Q. And at that time you had no small boat aboard of your barge?
A. No, sir.
Q. You usually carried a small boat on deck?
A. Yes, sir.
Q. You had an anchor aboard?
A. I think we had; yes, sir.
Q. Did not use it?
A. No, sir.
Q. Nor attempt to use it?
A. No, sir.
Q. Have a chain to the anchor?
A. I could not say for certain, although I suppose we must have had.
Q. Did you ever use an anchor before this?
A. No, sir.
Q. Never had any experience before this in using an anchor?
A. No, sir.

Q. You don't know that Brosseau had when he was on trips without you?

A. I don't know.

Q. You know he did not when he was on the trips with you?

A. No, sir.

Q. Did you have a tool-chest aboard?

A. Yes, sir.

Q. When you forbid the cutting of the ropes of these other canal-boats?

A. I asked them not to cut them out.

Q. This was where?

A. This was immediately after they had struck.

Q. You did not ask them not to cut them when they did cut them?

A. No, sir.

Q. That the men cut their ropes with their axes. I ask you if that was what made you ask them not to?

A. You asked me if I had asked them not to cut them. I did.

41 Q. When the men were in the act of cutting the ropes you asked them not to cut them?

A. They were in the act of cutting them when I asked them not to.

Q. At that time one or more of your ropes were untied at the time they were cut?

A. No, sir.

Q. Were all your ropes cut?

A. I believe they were.

Q. Will you swear to that?

A. No, sir. I swear we had not loosened any.

Q. Weren't the others loosened?

A. Not that I saw.

Q. How many ropes were cut?

A. I could not say; they were loosened all ahead or cut by the axes.

Q. Will you swear that more than one rope was cut with an axe?

A. No, sir.

Q. Then the other ropes must have been loosened.

A. They may have been.

Q. Did not you swear on the other trial they had been loosened?

A. I do not know.

Q. After you jumped on the boat you don't know whether they had?

A. I said I thought our stern line was cast off.

Q. Such was the fact?

A. Yes, sir.

Q. What place on the river where you supposed you could be safe in the tow?

A. I didn't suppose that any place. I did not say anything about being safe; nothing more than I said the steamboat might have saved us.

Q. Did not you say you "supposed the steamboat could take us to some place where we could be safe"?

A. Yes, sir.

Q. What place on that river?

A. I do not know.

Q. You have no knowledge of any point in that river where you could be safe?

A. No, sir.

Q. Who fastened the canvas?

A. Brousseau and myself, and those other men that was on the light canal-boat.

Q. You swear that the other men fastened it?

A. I don't know whether I swore that he helped fasten it or not; I won't swear.

Q. Did you swear on the former trial that they did not help fasten the canvas?

42 A. I do not know; me and Brousseau fastened the canvas. I don't know whether this man may have helped us.

Q. Was this question asked you, "If this canvas was fastened there, with their assistance and their advice?" and did you answer, "They did not help us fasten it"?

A. I don't know that I did.

Q. Which is true?

A. I could not say.

Q. Did they help you or not?

A. I could not say; they helped us shove the canvas down.

Q. Did you swear on the former trial that they did not help you fasten it?

A. I said they did not give us any help towards.

Q. Did you swear to that?

A. I don't know whether I did or not.

Q. If you did swear to it, is it true?

A. I don't know.

Mr. ANDREWS: I object to that form of the question that the witness don't know whether he said it or not.

Adjourned until morning.

TUESDAY MORNING SESSION, 9.30, *April* 22, 1884.

SAMUEL BROUSSEAU sworn for plaintiff.

Examined by Mr. ANDREWS:

Q. Where do you live?

A. Schodack.

Q. Were you a hand on the barge John T. Lee at the time she was sunk near West Point?

A. Yes, sir.

Q. You started with the Lee from some creek, did you?

—. Yes, sir.

Q. What creek did you start from?

A. Schodack creek.

Q. How far up the creek was it from the river that you started?
A. O, it must be about a mile or a mile and a half up the creek.
Q. What vessel towed you out?
A. The "Willie."
Q. And towed you to what point?
A. New Baltimore.
Q. Any one have the helm of the Lee?

Mr. FROTHINGHAM: We object to this testimony. How is that material to this question?

43 The COURT: It is descriptive; perhaps it is important; I don't know as it will do any harm; I will receive it.

Q. Who had the helm of your vessel, of the John T. Lee, in going from the place where she started in the Schodack creek to New Baltimore?
A. James Smith.
Q. The other hand on the boat?
A. Yes, sir.
Q. About how far from the place where this vessel started over to New Baltimore?
A. It must be three miles to go down around to New Baltimore; I should judge it was about that.
Q. Any other vessel in tow of the Willie at the time?
A. No, sir.
Q. You went over about what time in the day?
A. It was in the afternoon; I can't exactly tell what time it was.
Q. Any casualty or accident happen to the John T. Lee in going from the place where she started to New Baltimore?
A. No, sir.
Q. You lay there until what time at New Baltimore?
A. About 12 o'clock, I should think; it may be a little before or a little after.
Q. And then you were put in the tow of some steamboat?
A. Yes, sir.
Q. What steamboat?
A. Niagara.
Q. Put there by what vessel?
A. The "Winants."
Q. You know the name of the captain at that time?
A. No, sir.
Q. What part of the tow was she put?
A. Well, they called it in the tail end of the hawser tier.

The COURT:

Q. On the east side?
A. Yes, sir.
Q. East or left-hand side?
A. Yes, sir.

The COURT:

Q. How many boats abreast in that tier?

A. Four, I think.

Q. Do you know how many tiers there were?

A. No, sir; I do not.

Q. Were no other vessels put in the tow after you left New Baltimore?

A. I think there was one.

Q. Put in where—what point?

A. I don't know exactly where she came on; I know when
44 I got up in the next morning there was a light canal-boat tailing on behind us; the tier behind tailed on another boat.

The COURT:

Q. She ran single and alone?

A. Yes, sir.

Q. By how many lines were you fastened?

A. I think we had two out—forward and breast lines, two; there might have been more.

Q. Fastened in the rear or stern?

A. Only one from the stern and another one from the middle somewhere; I don't remember exactly; I did not fasten them.

Q. Went on without anything specially occurring until you got to what place?

A. Down the river below West Point; I don't know the name of the place.

Q. What occurred there?

A. I was just called up for to take my turn to watch; he told me I better go to look at the lines; I went on deck; I saw we were right close to the rocks; I hollered to him to come out; I grabbed the fender and held it down alongside, and then we struck the rock just as Smith came out; a minute or so afterward the boat plunged right out of the water; it kept on going a minute or so; Smith went back and looked at the gauge, said she had not made any water yet; we lifted up the hatch and we could hear the water come in her; we started to go down to look for the leak; we had to go; both of us went down; got an axe and cut away to find out where the leak was; we could not cut the timbers away to get to it—heavy timbers.

Q. Why you could not cut them away?

A. They were thick; spikes in them.

Q. Then what did you do?

A. We started and thought of a sail they had aboard—a big piece of canvas; that was the only way we knew how to stop it; we thought we could stop the leak and keep her afloat; we got the canvas down around her bow to pump her very near out, so we could work at the leak; we could not do anything; the force of the water came in so we could not put anything on to hold.

Q. Put anything where?

A. Over this hole inside.

45 Q. How did you try to fasten anything there?

A. When I went down we was going to see if we could not get something in the hole and nail a piece of board over it. I was not very long. I had to go there and pump. I don't know

what they were trying to put in it. I could not swear to that; he said he was going to try.

Q. Why could not you three prevent something from passing there?

A. The force of the water was too hard—spurted right in like coming out of the hydrant.

Q. What occurred then?

A. Well, then, after we got the canvas down we thought probably we could keep her afloat by pumping, taking turns. I believe in going around the tow again this canvas worked out. She leaked so bad we cut her loose; she was sinking.

Q. Who helped you put the canvas on?

A. There was a captain off of this canal-boat. I don't know his name.

Q. How did you fasten the canvas?

A. With ropes—pieces of ropes down round in under; hauled them up and tied them on each side.

Q. You found, then, she was sinking?

A. Yes, sir.

Q. When was that, before the steamer picked you up or afterward?

A. Afterward.

Q. You found she was sinking; when was that, before or after you were attached?

A. After we were attached to the tow again.

Q. You had not begun to sink; you kept the advantage of the leak until you were attached to the steamer?

A. Yes, sir.

Q. But you kept pumping, both of you?

A. Yes, sir; took turns pumping.

Q. Then the steamer came up and took you in tow again?

A. Yes, sir.

Objected to as leading by Mr. Frothingham.

Q. What occurred just before the steamer took you in tow?

A. Nothing; only I saw the mate come back and went over our bow.

The COURT:

Q. The mate of what?

A. Niagara; the steamer.

46 The COURT:

Q. What did he do when he came over your bow?

A. He asked us how bad we were leaking.

The COURT:

Q. What was the answer?

A. I told him we were leaking bad; asked him if he could not do something for us, and he said no.

The COURT: When he went over the bow of your boat did he stop to examine there?

A. No, sir.

The COURT: Did you tell him what had been done and what had happened?

A. I don't know; only he asked me how bad we were leaking.

The COURT: Did you tell him you had a canvas on?

A. No, sir.

The COURT: Could he see it as he passed over the bow?

A. No, sir; I don't know whether he did or not. I don't know whether he stopped long to look at anything. He said, No, he could not do anything for us. He asked how bad we were leaking. I told him we were leaking bad.

Q. Was that before or after you were attached to the tow?

A. I guess he was kind of busy getting the tow together—getting them ready.

The COURT: He has spoken of hitting on the rocks; he has spoken of the boat coming back, or the mate of the vessel going over the bow of his boat; he said nothing of the cause of the difficulty; why it was necessary for the mate to come back. I want to know whether there was a breaking of anything. Will you state whether or not you had discovered that the Niagara was not attached to you?

A. No, sir; I did not.

Q. Did not you at any time?

A. O, yes; after awhile; not at first. Smith said, "I can't see the steamboat." I looked; I could not see the lights of the steamboat.

Q. How as to the fact of your being able to see the lights generally before the accident occurred?

A. We could see them; they weren't so far off but what we could see them plainly.

Q. Will you state whether any alarm was given before you
47 were re-attached to the steamboat; and, if so, what alarm.

A. No alarm at all that I know of. I heard a boat blow—a steamboat.

Q. What, if any, alarm was given on your boats in tow?

A. No alarm given to the steamboat at all; when only I heard a lot of canallers say, "We are breaking in two."

Q. Did you hear any scream at all?

Mr. FROTHINGHAM: That is not admissible, what the canallers said.

The COURT: That is a part of the *res gestæ*.

Exception by defendant's counsel.

Q. Whether or not you heard any hollering?

A. Yes, sir; there was considerable hollering after they cut us loose.

Q. After who cut you loose?

A. The one we were tailed on to.

Q. That was after you were put back in the tow?

A. Yes, sir.

Q. I mean before the boat came back after you?

A. No, sir; I don't remember any hollering.

Q. How you came to be picked up by the steamboat; anything that occurred about her return to pick up the vessels?

A. No, sir; I don't know how she found it out or anything about it, only I knew she came back.

Q. Was it before or after she came back that the mate came across your bow?

A. After she came back.

Q. What, if anything, did he say about fastening you to the tow?

A. He did not say nothing; that was all the conversation there was.

Q. Your vessel, was it loose or fast to the broken part of the tow?

A. We were fast and all right, the same as we were before the accident.

Q. Then you say you was attached to the tow?

A. Yes, sir.

Q. And what occurred after that in respect to your vessel and its leaking?

A. Then we kept pumping and gaining on the water; got it pretty near all out, I believe they said, in turning around. I could not say whether we turned around. I was busy working;
48 did not have time to look. The canvas worked out anyway after she started off, and she began to leak again, and we could not do nothing with her.

Q. When you found she was leaking, what, if anything, did you do?

A. We went back and saw that the canvas had worked out, and we tried to get it back again and we could not do it.

Q. Do you know why that was so?

A. No, sir; I do not.

Q. What, if any, communication did you then have with the captain of the boat or mate or anybody when you found the canvas was off?

A. We could not communicate with them. They were on the tow-boat. We hollered to them that the Lee was sinking.

Q. Did you get any answer?

A. No, sir.

Q. To what extent did you halo—how many times?

A. Mr. Smith hollered a great many times.

Q. Will you state how near the Niagara was to you, so far as being able to hear was concerned?

A. I don't believe they could hear Mr. Smith, but I think they could hear the men up in the middle of the tow was hollering to them. I think they heard them, for when she was cut loose they came back to us; the mate and the deck hands came back to the boat we were on after they cut our barge loose. They came back on a light canal-boat. We had jumped off our boat on this light canal-boat.

Q. Why did you jump off?

A. Because they cut the bow lines loose and they let her go. We stood in hand to get off her.

Q. Did they give any reason for cutting the lines?

A. She was sinking.

Q. After that you heard the mate and some other men?

A. The mate — one or two of the deck hands came back.

Q. Where were you when they came back?

A. I was on the canal-boat that we had been alongside of.

Q. Was that before or after your vessel had sunk?

A. She had sunk then when they got back.

49 Q. What did the mate say?

A. He asked where the barge was, and the men they had hollered in the middle of the tow that the Lee had sunk and all hands aboard. When they came by us I said, "Here we are;" so they rowed in. We got in the boat. I said, "She has dumped one-half of her deck load and she may dump the other half; that may bring her all straight again; we may go back and see her." We went back and found she had sunk.

Q. Any part of her above water?

A. Nothing but the cabin; the cabin had been swept off with what brick that remained on deck.

Q. Know where you were when you sank?

A. All I know it was the chemical works; it was right about opposite there.

Q. How long was it from the time the accident first occurred, striking on the rocks, until she finally sank?

A. As near as I could judge, I went out there a little after 12, when he called me. I was out until the time I got aboard the Niagara; it was 3 o'clock. I did not have no watch and I did not see no clock from the time I went out until I got aboard the Niagara.

Q. Did you recognize any land when you struck, any particular land?

A. No, sir.

Q. You have said that it was West Point or something of that kind.

A. I heard them say it was going round the West Point.

Q. What knowledge did you have yourself as to whether you were going around West Point at the time?

A. I did not have no knowledge at all. I don't think I was up at that time.

Q. When you first came out, do you know where you were then?

A. No, sir.

Q. You was not acquainted with the river?

A. No, sir.

Q. You said in the first part of your examination that it was about West Point?

A. As I said before, I heard them say that——

Mr. ANDREWS: We do not ask for that.

Q. You do not undertake to give the locality?

A. No, sir.

50 The COURT: Do you know where West Point is?

A. I do now; yes, sir.

Q. From what you know now, don't you know where you were then?

A. I don't know where we were when we struck.

Q. I ask you now from your knowing West Point?

A. I don't know where we were exactly.

Q. Do you know where you were, nearly?

A. I know it was above the chemical works a ways, but how far I can't tell.

Q. Your watch commenced at what time?

A. Twelve o'clock.

Q. You said that Smith came down to call you?

A. Yes, sir.

Q. How soon after you called him to come up?

A. I got right up, put on my coat, dressed myself, and went right out.

Q. Found you were where?

A. Right near the rocks.

Q. Before you went up, heard any striking upon anything by the boat?

A. No, sir.

Q. Hadn't you struck when you got out?

A. No, sir.

Q. How near the rocks were you?

A. I could step from the barge on the rocks almost; I think I could.

Q. The rocks on which side of the river?

A. On the east side.

The COURT: Were these rocks rocks in the river itself or was it the shore—the bold shore?

A. There was a shore of rocks right near—did not seem to be very high—where I could step on them. It was all rocks all along there.

The COURT: These were rocks jutting out into the river?

A. Yes, sir; some of them was.

The COURT: How far from the actual shore was it?

A. You mean from the barge to the rocks?

The COURT: Yes, sir.

A. I could step from the barge on these. Did not seem to be no shore at all; nothing but rocks.

51 The COURT: They were rocks in the river itself, not part of the shore rocks?

A. They must have been rocks in the river.

Q. Above and below the rocks, how was the land there that you were near when you came out?

A. As far as I could see, they were all rocks all along there.

Q. How long had you been in the cabin when you were called to your watch?

A. I had been in all the evening, I guess. I went to bed about 9 o'clock.

Q. When did your watch commence?

A. Twelve o'clock.

Q. How is the fact as to the effect produced upon your mind by finding yourself in that condition, in so near the rocks?

A. I thought there was something wrong right away when I went out; that could not be any channel there.

Q. Whether you were alarmed or excited?

A. I was not alarmed. I knew we were going to run on those rocks; it kind of scared me.

Q. You say there was a time when the vessel heaved up or rolled?

A. Yes, sir.

Q. Shortly after you struck—how that motion affected you?

A. Not any.

Q. You said something about its turning the boat out of the water?

A. I think she went all out of the water—the way she struck.

Q. Did the lines which fastened your boat to the tow—how were they affected by this motion?

A. Not any at all.

Q. How is the fact as to whether they held all the way through—your lines?

A. I do not know; the forward lines were new lines.

Q. Whether or not you saw any breaking in them?

A. No, sir.

Q. Did you know the captain of the Niagara?

A. I did.

Q. Did you have any conversation with him that night?

A. Not that night; no, sir.

52 Q. Who was the first one that suggested putting the sail under the leaky place?

A. Mr. Smith.

Q. Did you have an anchor on board?

A. Yes, sir.

Q. Why did not you anchor when you found your vessel was leaking?

A. I don't know; there was no place there to anchor.

Q. What was the barge loaded with—brick? Do you know how many there were?

A. No; I can judge from what she generally turned out in New York.

Mr. FROTHINGHAM: I object to the answer.

The COURT: Perhaps that may or may not be proper if he knew the general capacity of the boat.

Mr. ANDREWS: There is really no dispute about it, but they wish to put us to the proof of every conceded fact in the case.

The COURT: What was the capacity of that boat?

A. No, no, sir; not exactly.

The COURT: Can you tell about?

A. I think she was capable of carrying 127,000 brick.

The COURT: How was she—full this time or not?

A. Yes, sir; she was loaded.

Mr. FROTHINGHAM: I object to it, as this man is not expert enough to prove the capacity of that boat.

The COURT: Strike out that answer. I will repeat my question.

The COURT: Do you know the capacity of that boat or about the capacity of that boat?

A. No, sir; I could not swear to it; all I know is the return which we get from each cargo, and they vary; sometimes turn out one or two thousand, sometimes less.

The COURT: Do you know in that way about the capacity of that boat?

A. I say I think she was capable——

Q. No, no; can you comprehend the question? If so, please give me the answer.

A. I can't give you no answer on that question.

The COURT: You have had returns, you say, from time to time of what that boat carried?

A. Yes, sir.

53 The COURT: What do you mean by that?

A. When we loaded at Schodack we got our returns on; they would vary, 126,000 to 130,000; so Mr. Brousseau said.

The COURT: Who is Mr. Brousseau?

A. A father of mine, brick-maker.

The COURT: Do you know in that way what the capacity of that boat was?

A. I could use only my own judgment what she was capaple of carrying.

The COURT: This much you do know, what had been the returns of the carriage of that boat?

A. Yes, sir; at different times.

The COURT: What was that?

A. I told you before we got returns from 126,000 to as high as 130,000.

Cross-examination.

By Mr. FROTHINGHAM:

Q. Where do you live now?
A. Schodack.
Q. Business?
A. Brick-making.
Q. When were you born?
A. In 1855, October.
Q. At that time you weren't 21 years of age?
A. I would have been 21 years old that month?
Q. Not quite 21 that time?
A. I don't think I was.
Q. What had been your business previous to that?
A. Brick-making.
Q. When did you go upon this barge Lee?
A. That day she left.

Q. That was your first experience?
A. First experience on her.
Q. In what capacity were you employed there?
A. Cook.
Q. Had you had experience before that as a navigator of the Hudson river?
A. No, sir.
Q. None at all?
A. Not as an experienced navigator.
Q. No experience as a navigator?
A. Yes, sir; a little. I have been on the river a little; on two years.
Q. As a navigator?
A. Not as a navigator.
Q. Then you had no experience as a navigator of the Hudson river before that time?
A. No, sir.
54 Q. You were sworn as a witness upon the first trial of this case?
A. Yes, sir.
Q. You weren't sworn as a witness on the second trial?
A. No, sir.
Q. Were you in court at that time?
A. No, sir.
Q. You weren't called as a witness at all then?
A. No, sir.
Q. Have you read over your former testimony, or had it read to you?
A. A little of it. No, sir; not all of it.
Q. A little of it read to you by whom?
A. Mr. Cady.
Q. When?
A. I guess it was Monday.
Q. Read from that book which he has there?
A. I am sure I could not tell you.
Q. Was it read from a printed book?
A. That I could not tell you.
Q. For what purpose was it read to you?
A. Not in any particular that I know of.
Q. Did it refresh your recollection at all?
A. No, sir; I think I can always remember that night without *reflecting* to any book.
Q. Did it refresh your recollection any of the fact?
A. No, sir.
Q. Do you know what object you had in view in listening to the reading of that testimony?
A. No, sir.
Q. What time did you go to bed that night?
A. I could not tell you exactly.
Q. About what time?

A. I should think about nine o'clock; it may be a little before or after nine.

Q. Did you sleep until you were called by Smith?

A. Yes, sir.

Q. In your bunk?

A. Yes, sir.

Q. So when he came down below you were in your bunk asleep?

A. I was asleep in the cabin.

Q. You don't know when he came into the cabin?

A. No, sir.

Q. Don't know how long he had been there when he called you?

A. No, sir.

55 Q. When was it Smith called your attention to the fact that the steamer was absent?

A. After we had struck.

Q. Until then you did not know she was absent?

A. I did not; no, sir.

Q. So you must have been drifting in the water all the time after the tow had parted until you discovered that the steamboat was absent?

A. Yes, sir; going along.

Q. What was it you heard the canallers say about the tow breaking?

A. That I forget. I don't remember of them saying anything. They were all hollering around there.

Q. Then you did not hear the canallers say anything about the tow breaking?

A. I heard somebody say the tow was breaking in two.

Q. That is all you know about the tow breaking in two?

A. Yes, sir; I worked all the while.

Q. What do you mean; the lines by which the boat or boats were attached together?

A. No, sir; I mean the steamboat went on with part of the tow.

Q. You never heard that the hawsers belonging to the steamboat parted?

A. No, sir.

Q. If you heard that the lines attaching the boats together parted?

A. Yes, sir.

Q. Do you know the custom that those lines belonged to the boats that were towed?

A. I know we put out our own lines.

Q. These bow lines you say of yours was new?

A. I am sure one of them was new.

Q. Which one; do you know?

A. No, sir.

Q. And were your other lines old?

A. No, sir; they were all good lines. They may have been used. I did not examine them.

Q. The other lines were old?

A. They had been used. I could not tell whether they were old

or new. All I could see they were colored a little; they weren't new lines.

Q. You could tell that they weren't new?

A. Yes, sir.

Q. You could not tell from their appearance how old they were?

A. No, sir.

56 Q. When you came on deck what did you do?

A. I saw that we were right near the rocks.

Q. What did you do?

A. I grabbed a fender.

Q. What did you do with the fender?

A. Put it down alongside of the boat.

Q. Whereabouts?

A. Up toward the bow; about a third of the ways back.

Q. Did you hold it there?

A. Yes, sir.

Q. Were you a little excited?

A. Yes, sir.

Q. Was on the former trial asked you, "Well, I put a fender out. I was a little excited when I saw where we were"?

A. I think it was.

Q. This question, "You put a fender out"? A. "I was going to, but I saw it was no use."

A. I don't remember certain.

Q. That was not true?

A. I know I put a fender out and held it there.

Q. Is it untrue that you were going to put a fender out, but I saw it was no use?

A. No, sir; that is not true. I did not say so.

Q. Is that true?

A. No, sir; it is not true.

Q. Did the counsel read that evidence to you when he read it over to you about the fender?

A. No, sir; I don't he did.

Q. Did not read that part of it?

A. No, sir.

Q. Then he did not read all your testimony?

A. No, sir.

Q. What part did he read?

A. I can't say. I did not pay but very little attention to what he was reading. We were all talking there.

Q. How long was he reading the testimony to you?

A. He did not read but very little to me that I can remember. I don't know what he said. I could not swear to what he read to me now.

Q. Can you tell us how long you held the fender?

A. No, sir; I could not.

Q. Can you come anywhere near it?

A. No; I held it until Smith came. He said, "What are you doing with that fender?" He says, "That will be no use to you."

57 Q. Do you know how long you held it there?
A. No, sir; I do not.
Q. Did you testify 15 minutes ago that you held it there a minute or so?
A. I don't know as I did.
Q. You say you could not cut a way to get at this hole?
A. Could not cut away those timbers.
Q. You could not see the hole?
A. I could see a plank bulging up in there and water coming. I could not see the hole.
Q. You do not agree with Smith that he saw the hole?
A. He might have seen a hole there, but I could not see no hole with the force of the water.
Q. Could you cut a way so you could see the hole?
A. No, sir.
Q. You did not cut a way so you could see the hole?
A. Cut a way where we could; saw the water bulging in.
Q. You could not see the hole?
A. No, sir.
Q. You don't agree with Smith—you heard his testimony?
A. Not all of it.
Q. In that respect you heard him testify here last night?
A. Yes, sir.
Q. You heard him testify to this hole?

Objected to by Mr. Andrews as immaterial whether he heard Mr. Smith.

The COURT:

Q. You could see the force of the water?
A. Bulging out. It came right in. It looked to me as if the plank was bulging in.
Q. How deep was the water then?
A. I can't remember.
Q. Was there any water in the hold when you saw that?
A. Yes, sir.
Q. You can't remember how much?
A. No, sir.
Q. Was the water covering the hole when you saw that?
A. No, sir.
Q. How long was that after the boat struck that you went down into the hold?
A. I can't say. We went down in the hold right away.
Q. How long before you held the fender?
A. When I was holding the fender it was before we struck.
58 Q. Then you did not hold the fender when you struck?
A. No, sir.
Q. You went right down in the hold the moment you struck?
—. No, sir.
Q. How long?
A. It may have been a minute or two minutes or three minutes.

Q. Might it not have been longer?
A. No, sir.
Q. Had not you looked at the water-gauge before that?
A. Smith ran back and looked at the water-gauge.
Q. Had not you in the meantime jumped upon another boat?
A. No, sir.
Q. You did not jump?
A. No, sir.
Q. Smith was examined in that respect. When the boat struck did not Smith jump on another boat?
A. Yes, sir.
Q. Did not you?
A. No, sir.
Q. You remained on board?
A. Yes, sir.
Q. When was it Smith jumped on the other boat?
A. Just as she reared and plunged in the water.
Q. Then he ran and jumped on the other boat?
A. Yes, sir.
Q. Was it before or after he looked at the water-gauge?
A. Before he looked at the water-gauge.
Q. How long did it take you to cut away to look at the hole?
A. I did not time myself. I did not have no watch.
Q. Did you cut away, or Smith?
A. No, sir; Smith cut away.
Q. And the water had been coming into the boat all the time he was cutting?
A. Yes, sir.
Q. Was Smith there alone?
A. When he was cutting away?
Q. Yes, sir.
A. No, sir; I was there a little while; couple of more men.
Q. How long were you with him?
A. I could not tell you.
Q. Can you form any estimate?
A. No, sir.
59 Q. You don't know what they attempted to put in the hole?
A. I did not see.
Q. Did you state a few moments ago you did not know what they attempted to put in the hole?

Objected to; the stenographer's notes will tell that.
The COURT: I think it is competent to ask.

Q. Did you swear a few moments ago you did not know what they attempted to put in the hole?
A. No, sir; I don't know what they attempted to put in the hole.
Q. Did you swear a few moments ago that you did not know what they attempted to put in the hole?
A. Yes, sir.

Q. When did you put the canvas under the bow?
A. It was not long after that we struck.
Q. When, in reference to the cutting away?
A. It was after we had cut away.
Q. And who put the canvas under?
A. I helped Smith; I don't know the other men; one or two of us.
Q. How many men were there there?
A. I think there was one or two.
Q. Any more?
A. There was lots standing around there, but none offered to help.
Q. You did put the canvas under?
A. Yes, sir.
Q. And then you worked the pumps and pumped the water nearly out of the boat?
A. Yes, sir.
Q. Way down to the keelso*me*?
A. Yes, sir.
Q. Then did you go down-stairs to look at the hole again?
A. I did not; I used to go down once in awhile to see how much water was left in her when I was not pumping.
Q. Did you go down to look at this?
A. Yes, sir; I went down to try to see the hole, but I could not see it.
Q. You could not see the hole when the water was all out of the boat?
A. It was bulged up so you could not see; the timbers were thick together.
Q. Was that before or after they were cut out?
A. After we cut the ceiling out.
60 Q. After you got the water all pumped out of the boat you could not see any hole?
A. We did not get the water all pumped out.
Q. You got it pumped to the keelso*me*?
A. Yes, sir.
Q. This break was on the keelso*me*?
A. A little ways from the keelso*me*?
Q. On which side of the keelso*me*?
A. On the left-hand side.
Q. How far from it?
A. I should judge two or three feet from it.
Q. Was that on the bulge of the boat?
A. Yes, sir; on the turn of it
Q. Higher than the keelso*me*?
A. That I can't swear to, whether it was higher than the keelso*me* or not.
Q. How many times did you go down below to see whether the water was pumped out?
A. I did not keep track.
Q. How many?

A. That I could not tell you; I went down to see whether we were gaining on the water.

Q. Can you give us any idea?

A. No, sir; I was too busy; I did not have time to put all those things down about running up and down that night.

Q. Was it because you ran up and down so many times?

A. I don't know whether it was that; I know we were busy; wanted to save the boat if we possibly could.

Q. How much water in the boat when you commenced pumping her?

A. Couple of feet, I should judge.

Q. How many pumps did you have?

A. There was only one that I knew of on the boat.

Q. What kind of a pump was that?

A. A pump that worked up and down with a handle.

Q. Do you know the size of it?

A. No, sir.

Q. One man worked it?

A. Yes, sir.

Q. You pumped two feet of water out of that boat?

A. Yes, sir; easy enough.

Q. Water came in all the time?

A. No, sir; it was not coming in so fast then; the canvas was down then.

Q. When was it that you got it all pumped out?

A. That I could not tell you exactly.

61 Q. How long did that take?

A. That I don't know.

Q. Was it before or after the mate came back?

A. We were pumping when the mate came back.

Q. You got it pumped out before you were attached in the tow again?

A. No, sir.

Q. You had not got it?

A. No, sir.

Q. Did Smith help you pump?

A. Yes, sir.

Q. Did you see the mate come aboard?

A. Yes, sir; I did.

Q. How did he come aboard?

A. I think—well, I saw him when he came on the boat. I don't know how he got there; whether he jumped from a canal-boat on our barge.

Q. Then you did not see him come aboard?

A. No, sir.

Q. Did you know he was the mate?

A. Yes, sir.

Q. You had known him before that?

A. I knew him by sight well.

Q. Before this—what was his name?

A. Charles Nelson.

Q. When was that?
A. It was after we struck quite awhile.
Q. How long after?
A. As I told you before, I don't know.
Q. According to your best judgment?
A. I can't tell you.
Q. Can you give us any idea at all?
A. No, no; not any real idea. I can't tell you. There is no use of my telling you how long it was, because I did not keep time of all such things.
Q. Did you have any conversation with him—Mr. Nelson? Did he speak to you first?
A. I don't know who he spoke to. He asked how bad we were leaking, and told him bad; asked him if he could not do something for us, and he said no. That was all he said.
Q. Had no other conversation with you?
A. No other at all.
62 Q. Did you testify to that on that *on that* former trial?
A. I think I did.
Q. Was that read over to you?
A. No, sir.
Q. Did you see the canvas work off of this boat?
A. No, sir; I did not.
Q. How do you know that it worked off the boat?
A. Of course, she commenced to leak again.
Q. That is the only way you know it was leaking any?
A. Yes, sir; I was pumping, I suppose, when she worked off.
Q. How far were you in the tow from the steamer at any time when you were in your position?
A. I can't exactly tell; quite a little ways.
Q. Nearly a quarter of a mile?
A. No, sir; I would not say we were a quarter of a mile.
Q. Very nearly that. What is your estimate of the distance that you were from the steamer when you were in that tow?
A. It was not quite a quarter of a mile.
Q. Nearly a quarter of a mile off?
A. It is quite a little ways.
Q. Were you ever on a steamboat?
A. Yes, sir.
Q. When she was in motion?
A. Yes, sir.
Q. Do you know there is considerable noise on steamboats?
A. Some steamboats.
Q. You have no idea when you hollered from this boat to anybody on board of this steamer that anybody could see you? Have you an idea when you were hollering on board of that boat to persons on board of that steamer, where the noise of the machinery was, that they could hear you?
A. I did not form no such idea.
Q. You have not any such idea now?
A. No, sir.

Q. You had no idea at that time of the currents of the river or tides?

A. No, sir.

Q. Or winds?

A. No, sir.

Q. No idea of navigating at all. Had you ever used an anchor on one of the boats?

A. No, sir.

Q. No experience in that line?

(Not answered.)

Q. Did you testify on the former trial about the location at West Point?

A. I did.

63 Q. Did you testify it was on the east side of the river?

A. I believe I did; I made a mistake.

Q. You have not much knowledge of the locality there?

A. No, sir.

Q. Did you see any sunken rocks there?

A. Yes, sir.

Q. Where?

A. Along the shore.

Q. Under water?

A. I could not see under water. I suppose there were lots under water.

Q. If you saw any sunken rocks there?

A. No, sir.

Q. The rocks that you speak of formed there?

A. Yes, sir.

Q. Counsel asked you if you attempted to anchor there. You answered that you did not know any place to anchor. You don't know whether you could anchor there or not?

A. No, sir; I do not.

Q. Where was most of the load on this boat—forward or aft?

A. Aft.

Q. Now, you say that she sunk about opposite the chemical works?

A. A little above, I think I said.

Q. That, you think, was about three hours after she struck?

A. I say it was about three hours from the time I went on deck until the time I got aboard of the steamer Niagara.

Q. So that, in your opinion, she sank about 3 o'clock?

A. No, sir; I claim that she sank before that; I did not say so.

The COURT: How long after she sank before you got on the Niagara?

A. Quite a little while; it must have been a half hour to three-quarters of an hour.

Q. The boat had proceeded in the tow from the place where she was made up down to the chemical works and sunk?

A. At the chemical works they cut her loose.

Q. How soon after you supposed the canvas came off did she sink?

A. That I could not swear to.
Q. About how soon?
A. I could not tell you.
Q. Can you form any idea at all?
A. No, sir.

64 Q. From the time the tow was made up again until you supposed the canvas came off you had been proceeding down the river nearly to the chemical works?

A. Yes, sir.
Q. Do you know the distance from West Point to the chemical works?
A. No, sir.
Q. Do you know about how fast this steamer was traveling?
A. No, sir.
Q. You were on a straight course down the river when the canvas came off?
A. I would not swear to that.
Q. You think you were?
A. I think we were.
Q. Did you testify on the former trial that you could not tell exactly how long you had been on that straight course; you thought it was about an hour?
A. I don't know as to that; I might have said it and might not.
Q. Is that your present impression?
A. I don't know.
Q. You lived in Schodack at that time?
A. It was our post-office address. We called it Schodack, and it is in the town of Stuyvesant.

Redirect examination.

By Mr. CADY:

Q. What was your idea as to calling to the men on the steamer that night?

Objected to by defendant's counsel.

PLAINTIFF'S COUNSEL: They have already gone into that question to undertake to show that he did call them; did not hear anybody on the steamboat.

The COURT: I suppose that you asked this witness the question as to the distance they were from the steamer and the impossibility of hearing for the purpose of conveying the impression that this man had lost his head, because it was an impossibility. Now, I think, in that point of view, only for the purpose of showing that he had not lost his head, that you may ask that question.

Exception by defendant's counsel.

A. For to see they could not do something for us—to run us ashore.
Q. When you called you expected they would hear you?
A. No.

65 The COURT: How did you expect that those persons on the steamer would hear you when they were so far away from them?

A. By the men at the forward end of the tow, by hollering to them.

The COURT: You expected that would be repeated by others ahead of you?

A. Yes, sir.

BERNARD LYNCH sworn for plaintiff.

Examined by Mr. ANDREWS:

Q. Where do you reside?

A. Brooklyn.

Q. What is your business?

A. Lumber business; I work at lumbering.

Q. And was you in the tow of the Niagara on the night of this sinking of the John T. Lee?

A. Yes, sir.

Q. In what capacity?

A. On a canal-boat.

Q. What boat was it?

A. The boat Cornell, I believe—Edward Cornell.

Q. How near were you—how situated in relation to the John T. Lee?

A. I think I was about the middle of the tow; probably 5 or 6 lengths ahead further in than she was; 5 or 6 lengths of tiers.

Q. Tell what you first observed in respect to the transactions which led to the separation of the tow.

A. The tow got broke up; the tow got all broke up.

Q. Just describe. Where were you?

A. I was about in the middle of the tow, on deck. I would not be positive. I was on deck at the first breaking, but the noise and the lights and parting, I was certain of that. The boats hitting against one another caused me to go on deck.

Q. You came on deck then?

A. Yes, sir.

Q. What was the situation of the tow when you got on deck?

A. Situation of the tow when I got on deck—first the lines were parting and parted soon after the steamboat got away from a portion of the tow and took some of the boats with her, and the remainder drifting around forward, or down the river, rather.

66 Q. How near was it to where they broke apart that your vessel was?

A. I think about one length.

Q. Which side of the tow commenced breaking?

A. I did not see the first breaking of the tow.

Q. When you came out were you separated?

A. The tow was breaking from the port side when I saw them; I think one tier ahead of me what remained after the steamboat or a part of a tier.

Q. What did you say about the port side?
A. I think the lines parted first on the port side.
Q. Which side is that going down?
A. East side.
Q. The boats had not broken loose where they were then. Which side?
A. On the starboard side.
Q. That is the west side?
A. Yes, sir.
Q. What did you say? You were describing a noise. Describe that a little more particular—cracking?
A. Drawed my attention to the separating of the tow first.
Q. How long after you came up on deck before the tow was entirely—the part of the tow on which you were was entirely separated?
A. I could not say how long, but very short time.
Q. About how long?
A. I could not exactly tell to the time or say to the time; very short.
Q. Whereabouts were you then? Whereabouts was the tow in the river?
A. After rounding West Point; pretty well on the east side.
Q. You say you were after rounding?
A. After coming around the point.
Q. You mean you were coming around or you had come around?
A. After the time we got around the east side we were rounding that point.
The COURT: When you came on deck were you in the act of turning that point?
A. Yes, sir; we were all turning the point at that time.
The COURT: When you got on deck?
A. Yes, sir.
Q. Whereabouts—about how near the east shore?
A. I could not tell exactly. It looked very close to me; did not look to be over 100 feet.
67 Q. Where was the steamer at that time?
A. The steamer had not entirely got loose from the tow at that time. It was in the act of getting loose.
Q. Did you notice which way she was heading then?
A. I think she was heading towards the west shore.
Q. Do you know about how wide the river is at that point where she was when you first came out?
A. I do not.
Q. Do you know how many cross-tiers there were in all that tow?
A. I don't know how many tiers.
Q. Do you know how many there were in that tier?
A. I would not be certain whether it was 4 or 5. It is so long I had forgotten about that part of it.
Q. What occurred after you came up?
A. The boat ahead of us in the tier I was in struck on the rocks;

struck a rock and turned over a little, and we got the family off—some children and the women. There was nothing the matter with the boat. She went to New York all right. We thought she was going to sink when we went after the children and women.

Q. How soon was that after you came out?

A. It was not a great while. I could not tell exactly how long it was.

The COURT: That boat got off all right?

A. She did not sustain any damages that I heard of.

Q. Did that boat break loose?

A. She was hanging in that portion that I was in.

Q. Did she remain in the portion that you were in?

A. Yes, sir.

Q. State what further occurred.

A. Drifting along until the steamboat came back and picked them up and went on down again with them.

Q. You know the localities, then, there. Did you know the names of the places?

A. Yes, sir; some of them.

Q. When you first came out do you know whether you were above—the tow was above or below Boathouse point?

A. I think there was a portion below; quite a portion of it on the other side. I would not be certain. It was in that neighborhood.

68 Q. Where is Boathouse point in respect to West point?

A. Further south, on the east side of the river.

The COURT: Then the tow was about opposite Boathouse point?

A. I think it was about, as near as I can remember—about Boathouse point.

Q. You think it is possibly a little further south—down the river—lower down than West point?

A. I am sure it is below West point.

The COURT: How far from Garrison's is it?

A. I could not say, exactly.

The COURT: Below or above Garrison's?

A. Above Garrison's; above the ferry landing.

Q. Which part do you call West point? Is it a particularly sharp point?

A. A short point; it is rather light; sticks out on a rock.

Q. That is what you call West point?

A. Yes, sir.

Q. How does the river run at West point, east across, say above this light; what direction as to north, southwest, or west?

A. I don't know as I could describe exactly the direction it runs.

Q. What do you say as to its being a very sharp or a very blunt turn in the river?

A. A very short turn, I should say.

Q. How could you describe Boathouse point? What is that, as to its appearance?

A. It is rocks in the bend of the river. I know it by the name of Boathouse point. That is all I know about.

Q. Mountain or hill or small ledge of rocks?

A. A little high pitch of rocks right on the edge of the river.

Q. How as to its sharpness—how much of a point is it?

A. I don't know as it is a point at all; no more than the name of it. I never took any notice to see how sharp it was. I knew it by that name. I never knew there was a sharp point there.

Q. What did you see of the John T. Lee after the tow had separated, if anything?

A. I seen them shaking lights. I heard they were singing out that the barge John T. Lee was sinking; otherwise, I did not go back to see.

69 Q. See the Niagara when she came back to pick up your tow?

A. Yes, sir; I saw the Niagara when she came and picked up the tow.

Q. Wherabouts did she pick the tow up, the part that had broken loose?

A. I think below the ferry, a little ways below Garrison's. I would not be certain how far.

Q. Had the whole tow remained together down to that time—that is, the part that you were on?

A. I don't know as there was anything broke loose. I never could find out especially. I did not see any portion that broke loose; some of the lines may have parted.

Q. How near were you to the port side of this tow?

A. I would not be certain; either second or third boat from the port side.

Q. How did the tow part, so far as the question is concerned of its breaking right straight across?

A. The straight tier did not break across.

Q. In what shape did it separate?

A. I think the lines on the port side parted, and they came back one length forward and took a portion of the other length with it; one line on the port side broke, and then they came back one length further back.

The COURT: In other words, when the tow broke the tier did not break off square?

A. It did not break off straight across. That is the way I understood it at the time.

The COURT: Tier did not break off square; the line parted on the left-hand side and then it broke on the other side, one tier further down?

A. Yes, sir; that is the way I understood it.

Q. Had you gone down the river on defendant's tow of steamboats before that time?

A. Yes, sir.

Q. And do you know anything about the tide at that point—what it was at the time?

A. It was ebb tide, drifting down the river.

Q. What do you say as to having ever been, when you was in a

tow going down the river, towed by a steamboat, at ebb tide, towed so near to the east shore or not?

70 A. I have on up tows. I don't know as I have on down tows.

Q. I mean on a down tow, ebb tide; do you know whether you have or not?

A. I never struck there before, so we must have been further away.

Q. Do you know anything about what is known among towboat men about springing the hawser?

A. I am not acquainted much with that part of the business; it takes steamboat men to know that.

Q. When you first came out on deck, I understand you to say, was immediately after you heard the cracking or snapping of the lines?

(Not answered.)

The COURT: In coming down the river, rounding West Point, you proceed in a southeasterly direction?

A. Yes, sir.

The COURT: In going up turn northeasterly?

A. Yes, sir.

Cross-examination.

By Mr. FROTHINGHAM:

Q. Where were you when you first heard this noise?

A. I was down in the cabin at that time.

Q. What were you doing there in the cabin?

A. Probably sitting down, taking a smoke or something of that kind.

Q. Were you asleep?

A. No, sir.

Q. Had you been asleep that night?

A. No, sir.

Q. Sitting down in the cabin?

A. I might be standing up.

Q. What was the first noise you heard?

A. Boats hitting against one another and the lines parting.

Q. You heard the noise of lines parting?

A. I heard the noise of boats (interrupted)——

Q. The noise; how many lines did you hear part?

A. I could not tell.

Q. Can you give any idea?

A. No, sir; there was too many parted to give any idea.

Q. About how many parted that you heard when you was downstairs?

A. I could not tell anything about it.

71 Q. Can you give us any idea at all?

A. Not when they parted.

Q. What kind of noise did they make?

A. I don't know as I could describe.

Q. How long did the parting of the lines make a noise?
A. A very short time; the rungs are made fast.
Q. Instantaneous, was not it?
A. It only takes a minute or so.
Q. Does it take more than a second?
A. I don't know. I could not say as to the length of time it takes.
Q. You could not tell how many such things you had heard when you was down below?
A. No, sir.
Q. Then you don't know how many boats parted when you were down below?
A. No, sir; I do not.
Q. You went immediately upon deck?
A. Soon as I could get up.
Q. As soon as you heard the noise?
A. Yes, sir.
Q. Were you dressed?
A. I was.
Q. Where was your boat in the tow; can you tell us what tier it was in?
A. She was in the second tier from the one that parted.
Q. Irrespective of the parting.
A. About the fourth or fifth tier.
Q. Is that as near as you can come?
A. That is about as near.
Q. How long had you been in that tow; how many hours?
A. I don't know how many hours.
Q. You had been there more than 24 hours?
A. Left Albany some tinre the night before.
Q. You could not tell how many hours?
A. No, sir.
Q. Can you give us any idea of how many hours in that tow?
A. No, sir. I don't think there was one man in the tow could tell that.
Q. Can you tell the name of the canal-boat alongside of you?
A. I believe there was——
Q. Can you tell the name of the canal-boat alongside of you?
A. I would not be positive, but I think a boat by the name of the Evans. I would not be positive to that.

72 Q. Can you tell the name of any canal-boat ahead of you?
A. No, sir.

Q. Nor any behind you?
A. No, sir.
Q. This occurred how many years ago?
A. I do not know.
Q. Don't know the year?
A. No, sir.
Q. Do you know the month?
A. No, sir; six or seven years ago. I never heard of the case until last winter.

Q. When was your attention first called to it after that time—after this incident—after this occurrence when was it that your attention was first called to it?

A. Last winter.

Q. So your attention had not been called to the subject from that time until last winter?

A. No, sir.

Q. And last winter you was sworn as a witness in this case?

A. Yes, sir. I thought it was all settled long ago.

Q. What was your position in the tow in reference to the boats alongside of you; were you outside?

A. No, sir; I was inside.

Q. How many boats were you from the port side?

A. As near as I can remember, one; there may have been two, but I know there was one.

Q. Only one or two from the port side?

A. Yes, sir.

Q. At the time you were sworn as a witness here last winter did you swear that your boat was the Coggesshell?

A. Yes, sir.

Q. Did you swear that you had been on board of the Coggesshell for about three years?

A. Yes, sir.

Q. Was the night dark?

A. I think, as near as I can remember, it was a pretty dark night.

Q. How long are these boats?

A. Each boat?

Q. Yes, sir.

A. About 96 to 98 feet long—something that way.

Q. How far were you from the first boat that broke apart?

A. I think about one length.

Q. You weren't directly behind it?

A. I was directly one length behind the portion of the Niagara.

Q. You were one length ahead of it?

A. Yes, sir.

73 Q. Did your line part?

A. Yes, sir.

Q. Did your line part from the others?

A. A portion of them; yes, sir.

Q. Did your line part after you came upon the deck or before?

A. They parted after I got on deck.

Q. How long did it take them to part?

A. A little while.

Q. What kind of lines were yours?

A. Pretty good lines.

Q. Whom did they belong to?

A. To my boat.

Q. Not to the tow?

A. No, sir.

Q. Had you changed your lines after the tow had been made up?

A. I put them together again.

Q. After you left Albany had you changed your lines?

Objected to by plaintiff's counsel as immaterial.

The COURT: Suppose this man, unknown to the captain of the boat, had changed his lines, would the tow be responsible for it?

PLAINTIFF'S COUNSEL: His line was not the line that parted itself.

The COURT: I don't know what it may be.

Overruled. Exception by plaintiff's counsel.

Q. Had you used any other lines; same lines that you used when you left Albany?

A. Same lines.

Q. The line that broke?

A. Yes, sir.

Q. Was it a new line or an old one?

A. They were all that season.

Q. Were they on the Coggesshall?

A. No, sir.

Q. They weren't on the Coggeshall?

A. No, sir.

Q. Were they on the Cornell?

A. Yes, sir.

Q. What time in the season had these lines been purchased?

A. I understand in the month of October?

Q. When did you buy the lines?

A. Along in the spring of the year.

Q. Was you the owner of that boat?

A. No, sir.

Q. You were the captain?

A. Yes, sir.

Q. You had been employed by the captain of the boat to navigate her?

A. Yes, sir.

74 Q. Who furnished the lines—you or the owner of the boat?

A. Owner of the boat.

Q. What line next parted after yours?

A. I could not say.

Q. Nor you could not say which parted after that?

A. No, sir.

Q. How long did it take these lines to part?

A. I could not tell you.

Q. Can you give us any idea?

A. No, sir.

Q. Was not it almost instantaneous? How many boats parted altogether?

A. I could not tell you; I did not keep no account of them.

Q. Did the lines of more than four boats part?

A. Yes, sir; more than the lines of four boats parted; there must have been more than four.

Q. I ask you what you know, not what must have been. What four boats in the tow parted their lines?

A. Four boats that the Niagara took with her. The boat left behind—that must have separated.

Q. There were only four in the tier, then—four boats parted their lines?

A. Yes, sir

Q. Yours was one of them?

A. I was not in the tier that parted; mine parted, though.

Q. When did that part?

A. About the time that the tow was breaking up.

Q. Your lines parted?

A. Yes, sir.

Q. Were you in the head tier after parting?

A. No, sir.

Q. What tier were you in after the parting?

A. I think one tier back.

Q. Had the boats ahead of yours parted their lines when yours parted?

A. Yes, sir; the boats ahead of me parted.

Q. All of them?

A. I guess so.

Q. Then your lines parted after the tow was detached from the steamer?

A. Breast lines parted.

Q. Did your lines part after the tow was detached from the steamer?

A. I think it was after or about the — steamer was going away.

75 Q. If the boats ahead of you had parted their lines before yours, then your lines must have been parted after the steamer had left the tow?

A. Not entirely after she left the tow; broke the breast lines.

Q. Then were you mistaken in saying that the boats ahead of you parted their lines?

A. The boats must have parted before they parted on that side of the tow.

Q. Did all the boats part their lines before yours?

A. I don't think they did.

Q. Which did not?

A. I am pretty sure they did not.

Q. Which did not?

A. Boats on the starboard side.

Q. Will you swear to it?

A. Yes, sir; on the west.

Q. Do you swear to that?

A. I think I can; I am pretty sure.

Q. Do you swear it from your recollection?

A. I would not want to swear to it, because I am not positive.

Q. Have you any knowledge or recollection upon that subject?

A. I would not swear to it.

Q. So that you don't know of your own knowledge whether the lines ahead of you had all parted or not?

A. The lines ahead of me all parted? I don't say that they all parted.

Q. Swear from your recollection or knowledge, now, whether the lines ahead of you had all parted or not.

A. I don't think so.

Q. I ask you to swear whether they were parted or not at that time.

A. I will not.

Q. How soon after you came on deck did your line part?

A. I would not be positive whether they were parted altogether or not; at the time I got up some of them parted; the whole I meant did not part at any time.

Q. Do I understand you you won't be positive whether they all parted or not after you got on deck?

A. One of my spring lines parted before I got on deck.

Q. These others ahead of you—had they parted before you got on deck?

A. The boats ahead of me, I believe, was parted before I got on deck.

76 Q. How many?

A. I could not say.

Q. How many noises had you heard up to that time?

A. I could not form any idea how many noises I heard; too many to keep account of.

Q. You say one of your lines parted, you think, before you got on deck; which line was that?

A. It was the line on the port side; the spring line on the port side of my boat.

Q. What other lines on your boat parted after that?

A. I think a breast line.

Q. A breast line on which side?

A. On the port side of the boat.

Q. Whose line was that?

A. I forget whether it is a customary thing on a boat—a breast line on one end and an amount of boats on the other side; I would not be positive whether it was mine or not.

Q. It was either yours or belonged to the adjoining boat?

A. Yes, sir; belonged to some one on the tow.

Q. After you got on deck and after your line had parted, what other line parted?

A. I could not tell anything about that.

Q. Could you tell any lines parted after that?

A. Yes, sir.

Q. Which?

A. Some of the lines that connected the boats away with the Niagara; some of the boats behind.

Q. Those parted after yours parted?

A. Yes; some on the starboard.

Q. They parted after yours?

A. Yes, sir.

Q. That you are positive of?

A. Yes, sir; portion of it broke loose when I got on deck, the steamboat in the act of going down the river, tow drifting towards the rock.

Q. You saw the tow drifting towards the rocks?

A. Yes, sir.

Q. You were sworn on the former trial?

A. Yes, sir.

Q. Did you then swear that you would not swear you were within 200 feet of the shore at that time?

A. I would not be certain to the distance.

77 Q. You are not certain now?

A. No, sir.

Q. No more certain than you were on the former trial?

A. I don't think I am; it might be a good deal less; it looked short.

Q. How long was it from the time you came upon the deck until the tow was made up?

A. I could not say.

Q. Can you give us any idea?

A. No, sir.

Q. None at all?

A. I could not tell.

Q. Where were you when the tow was made up?

A. I think we were a ways below Garrison's landing.

Q. When you saw the tow parted did that portion of the tow that was left with the Niagara proceed immediately after it—after the Niagara in a straight line? Did the rest of the tow follow the Niagara?

A. They went down the river and drifted towards the eastward.

Q. Did the tow—that portion of the tow which was attached to the Niagara—did that drift?

A. I don't suppose they did. I suppose the steamboat towed them.

Q. It was your portion of the tow that drifted after they parted?

A. Yes, sir.

Q. How far were you ahead of the Lee at this time?

A. Five or six lengths; I think so; I won't be positive as to how many lengths were behind me.

Q. So your portion of the tow drifted all this time after the parting. Was your portion of the tow drifting?

A. My boat was in the portion of the tow that was drifting in the river—drifted all along with the rest.

Q. The rest drifted with yours and they all drifted together?

A. Yes, sir.

Q. Can you tell which direction your portion of the tow was drifting?

A. Drifting down the river.

Q. Right straight down?

A. I could not say how straight.

Q. You can't say which direction it was drifting?

A. A boat is not likely to go down straight.

Q. You can't tell from your own knowledge which way they were drifting?

A. They were drifting down the river.

78 Q. Can you tell after the breaking of the tow the relative position of that portion of the tow that was broken loose?

A. I did not understand that.

Q. Were the boats in line when they drifted down the river, or did they stand obliquely?

A. I don't think they were in line.

Q. Then they were standing obliquely across the river?

A. The portion I was in was in line; the portion the John T. Lee was in was on a swing at that time.

Q. At the time that you saw that boat ahead of you you say it was a boat ahead of you that struck a rock?

A. She was in the tier ahead. I don't say that I was made fast to that boat. She was on the outside, on the port side next to the east shore.

Q. How do you account, then, for your theory that the further end of the boat was in shore if your end was; that boat was ahead of you that struck the rock?

A. Yes, sir.

Q. Then they could not have been standing obliquely across the river on a swing?

A. This boat was directly down the river when she struck the rocks.

Q. Her bow was pointing down the river when she struck the rocks?

A. Yes, sir.

Q. What was the direction of the bow of the Lee at that time?

A. I was not looking after the Lee at that time.

Q. How long did you drift in that way?

A. I heard some of them say it was about an hour.

Q. Is that your opinion?

A. When you are in trouble it looks—I could not form any idea of the exact time. I took it to be more than an hour at that time.

Q. Did you see a steamboat passing up the river at that time?

A. There was a steamboat coming up the river at that time.

Q. Did she signal to the Niagara?

A. I seen a steamboat come and I heard her blow her whistle; that steamboat was down the river ahead of us.

79 Q. Did she come right up the river?

A. I think she did.

Q. Do you know which course she took?

A. She was on her way up the river; took the west side of us.

Q. Do you swear to that?

A. I would not swear to that. She was in that direction when I saw her. She could not very well take the east side of us.

Q. You won't swear but that she took the east of you?

A. No, sir.

Q. How came you to be a witness on the former occasion?
A. I was summoned and appeared here.
Q. Whom by?
A. I believe he is a man by the name of Mr. Briggs.
Q. Where were you at the time?
A. In Brooklyn.
Q. Had you told anybody at that time about your testimony?
A. A fellow asked me if I remembered anything about it—Mr. Briggs.
Q. Had you at that time had litigation with this defendant?
A. Not at that time.
Q. At what time? At the time you were a witness in this case had not you had two or three suits with this defendant—at the time you were examined as a witness in this case had litigation with them?
A. I believe I did have some words with them.
The COURT: Don't you know?
A. Yes, sir.
Q. Were the bluffs on either side of the river shore right at that point?
A. I don't think it is much; I am not certain. I never took particular notice of the kind of raise.
Q. Do you know the name of the boat ahead of you that struck?
A. I do not.
Q. Did you ever hear what boat it was?
A. Not that I know of.
Q. Did you ever enquire?
A. No, sir.
Q. How many times have you been towed up and down the river?
A. I did not keep no account.
Q. A great many times?
A. Yes, sir; a great many times.
80 Q. How long have you been employed in the lumber yard in Brooklyn?
A. Going on six years.
Q. Have you ever been on the river during that time?
A. Yes, sir.
Q. During the time you were employed in the lumber yard?
A. Sometimes in the spring and fall of the year a few trips.
Q. What boats have you been on?
A. On the Cornell, Coggesshall; later I have been on the Tinkham.
Q. At the time you came on deck were there any of the centre boats that had their lines fastened to the tow ahead of you?
A. Yes, sir; there was some of them. I would not say they had their spring or breast lines; I don't remember about that part of it.
Q. Give us some little idea of the length of time that it took all these lines to part—all these lines that you heard part.
A. I could not form any idea.
Q. Took them an hour?
A. I don't think so.

Q. Took a half hour?

A. I don't think so.

Q. Took five minutes?

A. A very short time; I would not say how short. It might be two minutes, for that matter.

Q. Did you swear on the former occasion that most of the lines were parted—the only ones that did hold that time were some in the centre?

A. Some of the lines in the centre held around where I was that kept the boats together.

Q. Did you swear that most of them had parted? The only ones that did hold at that time were in the centre?

A. The lines that kept them together were the centre lines.

Q. No, no; the lines that parted ahead of you. Did you swear on the former occasion when you got on deck they had all parted except those—most of them had parted—only those? They had all parted except the ones held in the centre?

Objected to by plaintiff's counsel.

Q. I understand you to say they had parted on each side
81 of the tier when you went out. Was that question asked you?

A. I think a number of them were parted on the east side.

Q. Which side?

A. On the east side.

Q. Were you asked that question? I understood you to say they had parted on each side of the tier when you went out.

(Not answered.)

The COURT: The witness is asked this question: Did you on the former trial testify when you came out that the lines on each side, on both sides, were parted?

A. I don't remember that I did.

Q. Did you not answer, "Yes, sir; most of them were parted"?

A. I guess most of them was; not the whole of them.

Q. Was the question not then asked you, "Only ones that did hold at that time were some in the centre?" and did you not answer, "Yes, sir"?

A. I don't remember it.

Q. Was that true?

Objected to by plaintiff's counsel.

The COURT: How is the fact? That is proper.

PLAINTIFF'S COUNSEL: That I do not object to.

The COURT: I will rule against the question for this reason: Whether you asked him that is true or not, it is a question liable to be misunderstood. You may ask him what the question was, that the fact was that only the lines in the centre held; that you may ask.

Exception by defendant's counsel.

Q. Was not it the fact that the only ones that held were some in the centre?

A. I don't know what you mean by some in the centre.

Q. I mean the centre boats.

A. I never answered such a question. No centre boats that held that I know of. I don't know what you mean by asking about the centre boats. I never remember hearing such a question before.

The COURT: Without any regard to before or after was the fact, as he asks, was it the centre lines or centre boats that held the portion that was left?

82 A. The centre lines kept them together. Some of them broke; some did not; kept them from separating in the river.

Q. And were you asked did they part almost instantly after you got up there?

A. Pretty soon.

Objected to by plaintiff's counsel.

The COURT: I can't say that the question is nonsensical or the answer is nonsensical.

Q. You were asked that question on the former trial, and did you answer, "Pretty soon after"?

A. I forget now.

Q. Was that the fact?

A. That was the fact.

Q. And did you say it was a very short time; I would not be certain; it could not have been two minutes?

A. I don't remember about making the time so short.

Q. Was that the fact?

A. A very short time, but I could not say as to the minutes it was.

Q. Were you asked this question: "I understood you to say that the complete separation was right after you got up," and did you answer, "Yes; right away after I got up"?

A. That is right.

Q. And such is the fact; such was the fact?

A. Yes, sir; that was the fact.

Q. Do I understand you correct or do you mean to be understood that some of your own lines had parted before this separation took place?

A. Before the whole separation took place?

Q. Yes, sir.

A. No, sir; not before the whole took place; one had parted before the whole separation.

The COURT: According to his best recollection a part of the lines in front had parted before his line, but not all of them, and his best recollection was that those starboard side had not parted at the time that his parted. We have got that down plain. I understand this version of it; he heard the cracking; he went upon deck; a number of the lines were parted, but not all; but very soon, almost instantly, they had entirely parted. He also says

that when his lines parted the lines in front had not all parted, but those on the port side had; those starboard side after that.

83 Q. You say one of your lines had broken before the others in front of you broke?

A. One of them was parted when I got on deck.

Q. Did any of your lines part after that?

A. One of my breast lines.

Q. Did that part after the other one parted?

A. Yes, sir; after my spring line.

Q. After the others ahead of you, your breast lines?

A. I don't remember that the breast line parted after the steamboat got clear of the tow or not.

Redirect examination.

By Mr. ANDREWS:

Q. Which do you mean is the spring line?

A. Those are the lines that tow; that connects the boats together.

Q. And the breast lines are what?

A. They are a smaller line that keeps them side by side.

Q. You say when you first came up—shortly after you first came up—the tow separated, and immediately afterward, or very shortly afterward, one of the boats went, you struck on a rock on the east shore?

A. Yes, sir.

Q. Whether the part of the tow drifted, after the tow parted and drifted on that rock, or how did it get there?

A. Drifting down the river towards the east shore and struck the rocks.

Q. And that is what you did there—drifted down the river before striking the east shore?

A. Yes, sir.

Q. Then you said that on the former trial you swore that you was on the boat Coggesshell?

A. Yes, sir.

Q. You corrected it before you got through testifying?

A. Yes, sir.

Q. Can you tell how you came to make the mistake?

A. I owned the boat Coggesshell at the time; the man I was freighting for owned the boat Cornell. He used to shift me around on the Cornell, leave the Coggesshell down by his dock, and that was the way I got shifted around, and thought I was on the boat Coggesshell.

Q. If you know Mr. Ayres.

A. Yes, sir.

84 Q. Did you know him at the time of this accident?

A. Yes, sir.

Q. Was he on the boat?

A. Yes, sir.

Q. Whereabouts?

A. As near as I can remember, he was in the same tier I was in.
Q. Is he here?
A. Yes, sir.

Recross-examination.

By Mr. FROTHINGHAM:

Q. On the former trial you were examined at some length upon the subject of your being on this boat Coggesshell; examined a long time on the subject. You were examined on a certain day on the former trial for some length on being on board of this——
The COURT: Were you examined at some length on the other trial about your being on board of the Coggesshell?
A. Yes, sir.
Q. Had you sworn that you were on that boat?
A. Yes, sir.
Q. You insisted upon the whole cross-examination during that day?
A. Yes, sir.
Q. And you went off the stand?
A. Yes, sir.
Q. And the list of the boats making up this tow was produced in evidence after you had left the stand?
A. Yes, sir.
Q. And then you came back and said that you were not on the Coggesshell, but on some other boat?
A. Yes, sir.
Q. And that was on the next day?
A. Yes, sir.

Redirect examination:

Q. And said that you were on the Cornell?
A. Yes, sir.
Q. The litigation which you had with the Schuyler Tow-Boat Co., just explain that.
A. A few years previous to that they sunk a boat on me, coming down below Castleton.

Objected to by defendant's counsel.

85 The COURT: In a general way, as you have drawn out the fact that he had difficulty with the Schuyler line at the time he was subpœnaed as a witness, they may show what the source of the litigation was.

Q. This line that you were traveling with that night—what line was that?
A. The Schuyler line.
Q. Was this litigation which you had with the Schuyler line before this accident litigation between both parties or only one?
A. It was the Schuyler line.
Q. You made a claim against them, or was that the nature of it?
A. Yes, sir; not in regard to sinking the boat, on account of them

bringing them up here against me without having anything to do with this case at all. They agreed to fix this boat; make it all right.

Mr. ANDREWS: We do not insist upon it.

Q. Was that one suit of the litigation you had with them?
A. No, sir.
Q. You never sued them?
A. No, sir.
Q. You never had a lawsuit with them?
A. No, sir; they sued me. I employed a lawyer. They never followed it up.
Q. Have they ever tried that suit?
A. I don't know. The lawyer said when he wanted me he would send for me.

Recross-examination:

Q. They did sue you?
A. Yes, sir.
Q. Upon a note?

Objected to by plaintiff, unless we can go into the whole matter.

Q. You never sued them?
A. No; I never paid them. That was the only way I could get square with them, to leave some bills.
Q. Did not you state immediately after leaving the stand on the last trial that you would get square or was going to get square with them?
A. No, sir.
Q. After having sworn on the former trial?
A. Yes, sir; I never brought it up against them; never did against me.

86 Q. Did you tell Mr. Wolcott on that occasion, immediately after leaving the stand, that you could poison the case more than you had, or words to that effect?
A. I said something to them.
Q. You so swore to that on the former occasion?
A. Yes, sir; I could show that they had a habit of not squaring up.
Q. You are going to poison the case because they would not square up?
A. Of course.

Redirect examination:

Q. You meant whenever the Schuyler line did damage they would try to get out?

Objected to as leading and improper.
The COURT: I will strike that out.
Exception by plaintiff's counsel.

AIMEE AYERS sworn for plaintiff.

Examined by Mr. ANDREWS:

Q. Where do you live?
A. Albany.
Q. Business?
A. Boatman.
Q. How long have you been in the business of boating?
A. Fourteen years.
Q. Was you upon the tow in October, 1876, in the Niagara when the John T. Lee sank?
A. Yes, sir.
Q. What was you doing on the tow—what business was you doing there?
A. I had a boat in the tow going down the river.
Q. What was your situation on a boat?
A. I was captain of my boat. I was running a canal-boat.
Q. What was the name of the vessel?
A. John Noyes.
Q. While you were on the way down where did you make up your tow?
A. In Albany.
Q. Did you see Capt. Bernard Lynch on the way from Albany to West Point?
A. Yes, sir.
Q. Where was he? What boat was he on?
A. I don't know the boat he was on.
Q. What was he doing there?
A. He was on the boat going down the river.
87 Q. In what business was the captain?
A. Captain of that boat.
Q. How near was she to your boat?
A. Right alongside of her.

Cross-examination.

By Mr. FROTHINGHAM:

Q. Which side was his boat of yours?
A. On the starboard side.
Q. He was on your right?
A. Yes, sir.
Q. Were you on the outside?
A. I was on the outside; on the left side.
Q. Were you on deck at this time, parting of the lines?
A. No; I don't think I was.
Q. When did you come on deck?
A. Just a few minutes after.
Q. Had your lines parted?
A. No, sir.
Q. How soon after this, could you tell, you came on deck?
A. A few minutes.

Q. You did not see any boats strike the rocks?
A. Yes, sir.
Q. This boat ahead of you?
A. Yes, sir.
Q. You know the name of it?
A. No, sir; I don't remember.
Q. At the time you came were the boats detached from the tow; had they broken loose?
A. Yes, sir.
Q. They had all broken loose?
A. Yes, sir.

Redirect examination.

By Mr. ANDREWS:

Q. Had your boat broken loose when you came up?
A. She was fast to the boat and the part of the tow that was broken loose.
Q. They had all separated from the Niagara when you came up?
A. Yes, sir.
Q. I don't precisely understand which boat it was that you knew struck a rock, a boat on the port side or starboard side?
A. Port side.
88 Q. In the part of the tow that broke loose or the other side?
A. Yes, sir.
The COURT. A boat ahead of you?
A. Yes, sir.
The COURT. Do you know where the Lee was?
A. I know she was on the tail end.
The COURT. Do you know anything about the Lee striking?
A. No, sir.

EDWARD BROUSSEAU sworn for plaintiff.

Examined by Mr. ANDREWS:

Q. Where do you live?
A. I live in the town of Stuyvestant.
Q. Where did you live in 1876, in October?
A. In the same town.
Q. You recollect of hearing of the accident which happened to the barge John T. Lee—Capt. Salisbury's barge?
A. Yes, sir.
Q. Did you see her loaded at that time?
A. Yes, sir.
Q. What was she loaded with?
A. Loaded with brick.
Q. With how many brick?
A. Her load counted 127,000.
Q. Was you in the brick business at that time?
A. Yes, sir.

Q. Acquainted with the value of them?
A. Yes, sir.
Q. What were they worth at that time per thousand?
A. From $5 to $5.50.
Q. Worth where?
A. In New York.
Q. How much were they worth at your place?
A. About $4.50.

The COURT. I will allow you four witnesses apiece on the value of the barge.

Cross-examination.

By Mr. FROTHINGHAM:

Q. Were these brick counted when they were put on the barge?
A. Yes, sir.
Q. By you?
A. By my men.
Q. Brick that were made in your yard?
A. Yes, sir.
89 Q. What size brick were they?
A. We generally call them—we take five brick to measure a foot each way.
Q. What size brick?
A. We call 2½ inches thick, 8½ long, 4 inches wide.
Q. Were they made in a mould?
A. Yes, sir.
Q. All made in the same sized mould?
A. Yes, sir.
Q. They are the ordinary sized brick?
A. We call them the Haverstraw size.
Q. That a little larger than the size?
A. About the size.
Q. About the same size that are used here?
A. Yes, sir.
Q. Hard brick or soft brick?
A. Hard brick.
Q. Look at this brick and see about the size they are (showing witness a brick).
A. Something like that.
Q. About that size?
A. Yes, sir.
Q. About that quality?
A. Yes, sir.
Q. Is that a hard or soft brick?
A. I call that a hard brick.
Q. About what does that brick weigh?
A. I should judge some little over 4 pounds, and some, little less.
Q. What does that weigh, in your estimation?
A. I don't think that would weigh 4 pounds.
Q. A brick when wet weighs more?

A. Yes, sir; after they are soaking wet.

The COURT: The brick will absorb a great deal of water?

A. Yes, sir; a brick will absorb about a pint of water.

Q. (Showing witness another brick.) There is a brick that has been wet; that is about the same size as the other?

A. About the same size.

Q. (Showing the witness a 4-lb. weight, certified to be correct; showing scales weighing those two brick).

A. (Witness weighs the brick on the scales).

Q. How much does the wet one weigh?

A. Weighs more than 4 lbs. and 2 oz.

Q. Just weigh the dry one.

A. About 4 lbs.

Q. Not much over 4 lbs.?

A. Not much.

90 Q. A little over?

A. Just the balance a little quicker.

Q. It weighs to exceed 4 lbs.?

A. Yes, sir.

Q. You think that is about the average of the brick?

A. Yes, sir; about the average of the brick as made; the dry one.

Redirect examination.

By Mr. ANDREWS:

Q. This 4½-lb. brick, what is the cause of that weight?

A. No, sir.

Q. You talk about one dry brick?

A. This one dry brick, and the other one soaked with water.

Q. You know something about the reason it weighs more?

A. The wet brick weighs most; it has been standing in the water or soaked in the water.

Q. Where it has been rained on?

A. Yes, sir.

Q. And this one not?

A. This one right from the kiln.

Q. How—in what condition were the bricks on the Lee?

A. All dry.

Q. This wet one has been wet here for the purpose of weight?

A. Yes, sir.

Recross-examination.

By Mr. FROTHINGHAM:

Q. Where had your brick been before they were loaded; piled on the dock?

A. No, sir; piled in the kiln, where they had been to work.

Recess until 2.30 p. m.

TUESDAY AFTERNOON SESSION—2.30

CHARLES NELSON sworn for plaintiff.

Examined by Mr. CADY:

Q. Where do you reside?
A. Jersey City Heights.
Q. What is your business?
A. Ferry-boat man at present.
Q. In what company were you employed?
A. Hoboken Ferry Co.
Q. By whom were you employed in October, 1876?
A. By the Schuyler Tow-Boat Line.
91 Q. On what boat were you employed?
A. On the Niagara.
Q. What is the Niagara—a steam tow-boat?
A. Yes, sir.
Q. What was your position on that boat?
A. Mate.
Q. Who was her captain?
A. Cyrenus Craig.
Q. Do you remember the occasion on which the John T. Lee sank—the barge John T. Lee?
A. I do.
Q. Whereabouts did that happen—the sinking of the boat?
A. Just about that turn at West Point—after we got turned.
Q. What was the John T. Lee?
A. She was a barge.
Q. Was she in a tow attached to the Niagara?
A. Yes, sir.
Q. Do you know whereabouts she was in that tow?
A. She was on the last tier, port side.
Q. Did you discover at any time that night that the tow was broken in two?
A. Yes, sir; we did after awhile.
Q. Who discovered it?
A. Captain discovered it first.
Q. Capt. Craig?
A. Yes, sir.
Q. Were you anywhere near Captain Craig when he made the discovery?
A. I was right alongside of him.
Q. Where were you?
A. On the upper deck.
Q. How was your attention first called to the fact?
A. Captain says to me: "I think that tow is broken in two."
Q. Did anything else occur about that time to attract your attention?
A. Yes, sir; there was a steamboat going up by us, to the eastward of us; she tooted her whistle two or three times.
Q. Eastward of the Niagara?

A. Yes, sir; general expression among boatmen, "tooted her whistle."

Q. She gave three blasts on the whistle?

A. She did it twice.

Q. So — went by she gave these blasts on her whistle?

A. Yes, sir.

Q. How long a time elapsed—her giving the first three and the last three?

A. Probably in a minute or two; probably not that much; she had not gone but a couple of boat-lengths before she tooted a second time; by that time we discovered what was the matter.

Q. What was the matter?

A. The tow was broken in two.

92 Q. What did you then do?

A. We got the hawser up in the gangway and rounded to—one of the hawsers attached to the canal-boat up midships to help turn around.

Q. What was the hawser you speak of?

A. A long rope, generally 150 fathom long, six or seven inches in diameter—what we call canal hawser.

Q. Is that the rope by which the rope is attached to the tow-boat?

A. Yes, sir.

Q. After bringing the hawser up what did you do?

A. Pilot had his wheel hard over and worked the steamboat up the river.

Q. Where did the steamboat go after she had been turned around?

A. We worked up in position where we could get hold of that part that was broke loose.

Q. She went back up the river until you reached the detached part of the tow?

A. Yes, sir; so we could get near enough to it with the hawser.

Q. Were there any boats left attached to the Niagara?

A. Yes, sir.

Q. Do you know how many?

A. I don't remember exactly; somewhere in the neighborhood of eleven or twelve.

Q. Do you know how many boats there were in that tow that night?

A. I don't recollect.

Q. Have you any impression about it?

A. Between forty and fifty boats—somewhere in that neighborhood. I could not exactly tell.

Q. May there not have been as many as sixty?

A. No, sir.

Q. Of that you are sure?

A. Yes, sir.

Q. Who made the tow fast together again?

A. I did. I made fast some; some of the men on the boat made their own boats fast.

Q. Did you take the general charge of fastening the tow together again?

A. I told them to get fast as quick as possible.

93 Q. Whom did you tell that?

A. Men on the boat; they are always willing to get theirs in; some men fasten some others — theirs.

Q. Did you get off the Niagara at all that night?

A. I did.

Q. Did you tell that while the tow was being made fast together again?

A. Yes, sir; I was on the tow to make it fast.

Q. Whereabouts in the tow did that break occur?

A. Where it broke entirely in two was between the third and fourth tier.

Q. Can you tell which boat broke loose first?

A. One on the third tier, port side.

Q. Port side is the east?

A. Yes, sir; left-hand side going down.

Q. Did you make that boat fast again when the tow was made up?

A. I did.

Q. Did you make any other boats fast yourself?

A. I helped make another one fast; by the time I got this boat they had all made their boats fast; I went to see if they were all fastened.

Q. *Decide* the condition in which you found that tow-boat of the third tier when you came back.

A. She had swung around, head up the river.

Q. Her head swung so her bow pointed up the river and her stern down?

A. Yes, sir.

Q. She had changed ends?

A. Yes, sir.

Q. What did you then proceed to do?

A. Went around; got her turned the other way again; let her lines go so she could swing around.

Q. Got her turned around—bow pointed down the river?

A. Yes, sir.

Q. Did you proceed to make her fast?

A. I did.

Q. What lines did you use?

A. I used one she had, and the other I doubled up.

Q. Were all the lines by which she was attached to the boat in front of her—were all those lines broken?

A. Yes, sir.

94 Q. You used one of those lines when you came to make her fast again?

A. Yes, sir.

Q. How did you use it?

A. It was long enough to put—there was only a short piece broke.

Q. You tied it together?

A. No, sir; I made it fast to a cleet on the other boat.

Q. Describe the other line that you did not use.

A. I thought it was too old.

Q. That was the reason you did not use it?

A. Yes, sir.

Q. Did you have any conversation with the captain of that boat at the time you made her fast again?

A. Yes, sir.

Q. Did you speak to him about that rope which you did not use?

A. I did.

Q. What did you say to him?

A. I told him it was not fit to put out again.

Objected to by defendant's counsel; conversation with the captain of the other boat.

The COURT: Is it a part of the *res gestæ?* I think it is competent.

Exception by defendant's counsel.

Q. What did the captain do then?

A. He admitted he had no other.

Q. What then?

A. I told him he had; he must have; wanted to know if I could not get one for him; I said, No.

Q. Did he finally give you another line?

A. I said, "Give us an old wharf; you got a good wharf." He said, "Yes." I said, "That is a good line;" so we doubled that four parts.

Q. The wharf line is a smaller line; that is used for fastening a canal-boat in the tow?

A. Sometimes.

Q. Was that wharf line smaller than the lines which you found broken?

A. Yes, sir.

Q. And that with one of the lines to which she had been attached to the tow and this wharf line you made her fast again?

A. Yes, sir.

95 The COURT: You have the declarations to the captain that one line was too old?

A. As near as my recollection goes in that case. I did not want to put it out.

Q. You had considerable experience in the management of tows?

A. Yes, sir.

Q. How long were you in the employ of the Schuyler line?

A. Eleven years.

Q. During all that time the season of navigation engaged in the management of tows?

A. Yes, sir.

Q. In what capacities?

A. Ten years I was mate out of the eleven.

Q. And you were familiar with the strength of lines and ropes?

A. Yes, sir.

Q. In your opinion, if that defective line had been a good line would it have broken?

A. No, sir.

Q. Who made up that tow at Albany?

A. Mr. Ableman—Renns. Ableman. I was one who helped him.

Q. What was his business at that time?

A. He was agent, collecting bills and see that the tows were with the lines and proper lines out—see that the tows are properly fastened—proper shape.

Q. It was the duty of the towing company to see that proper lines were used?

DEFENDANT'S COUNSEL: That this witness can hardly answer.

Q. During the ten or eleven years in which you were employed by the company had it been your business in making up tows?

A. I had always to be there.

Q. What was your duty in the making up of tows at Albany?

A. Boats coming down from Troy. I would be out. Renns. says to me, "Put in such a place; make her fast there to such a boat," and so on.

Q. What, if anything else, was your duty?

A. About all my duty in making up tows.

Q. Did you look after the lines at all?

A. Yes, sir.

Q. What was your duty with respect to the lines?

A. All my duty was if Renns. was not there, "Captain,
96 give us a good line. I will make you fast there under those boats astern."

Q. If a defective line was used what did you do with it?

A. I tell him that was not fit to tow by, and make him give me another one.

Q. Did you make up this tow of the Niagara at Albany in the same way you made up other tows?

A. Yes, sir.

Q. Is the manner in which you have described in making up tows the manner in which this tow was made up?

A. Exactly same thing, as far as I recollect.

Q. How long did it take, that you remember, to make up that tow of the Niagara?

A. I don't recollect how long it took that day.

Q. How long does it generally take?

A. It depends upon how the boats come down to Troy. Sometimes come one or two at a time; sometimes seven or eight; sometimes an hour and two; sometimes all day; it depends upon how they come down.

Q. Did you, when this tow was made up at Albany, and Ableman go over the tow and examine the lines?

A. We looked at them; I suppose Renns. did; just the same as we always did.

Q. How was that?

A. Told the captain to get out a good line; see if we make it fast; we would say, That is not good for nothing.

Q. Did you and Ableman go over the tow and examine the lines at Albany?

A. Not for the express purpose to examine lines.

Q. You did not do it on this occasion?

A. No, sir; we did not on no occasion.

Q. Are you familiar with a proceeding known as "springing the hawser"?

A. Yes, sir.

Q. When the tow of the Niagara went around West Point that night was the hawser sprung?

A. I don't recollect.

Q. What is your best impression about it?

A. I don't recollect at all if it was or not.

97 Q. Don't you recollect anything about it at all?

A. Nothing about springing the hawser?

Q. Whose duty was it to spring the hawsers?

A. Captain's orders to tell the mate and deck-hands to put a spring to the hawser.

Q. Whose duty was it to carry out that order?

A. Captain's order to carry it out.

Q. Whose duty was it to see that the order was executed?

A. I was.

Q. Do you remember receiving any such order that night?

A. No, sir.

Q. Do you remember executing any order of that kind?

A. Not of that kind, I don't recollect.

Q. Is not it your best impression that no such order was given or executed?

A. I could not swear one way.

Q. What is your impression?

A. I could not swear to nothing.

Q. You were sworn on the former trial of this case?

A. Yes, sir.

Q. You were asked, were you not, whether the hawser was sprung that night?

A. I was.

Q. And did not you answer, in substance, it was your best recollection it was not?

A. I don't think I did.

Objected to by Judge McLellan; he is their own witness.

The COURT: What is the duty of the mate on the boat?

A. In general or uncertain?

The COURT: In general.

A. That is a rather long story to go over.

The COURT: To make the point of my question apparent I will put this question: What do you mean by springing the hawser?

A. It is by getting—to kind — illustrate it: There is a hawser leading, 3 or 4 hawsers, three of them that lead to canal-boats; we take for a 7-in. line sometimes—which are taken around first one and then the other, and so on; make it fast on the last one; then we

lead out to the side chock, midship of the steamboat, holding it taut as we can get it, and then we go up on the upper deck again.

98 By the hawser there we stand by; under the direction of the captain we slack on this hawser a little by little, one man by each hawser, if it was necessary. Big tows and the steamboat would not come down, afraid — the tow sagging off the east shore, and he saw that the steamboat is not going to keep in the middle of the river; to keep clear of the rocks, we slack on this; that takes the heft of the stern of the boat midship, and that helped the steamboat turn—that leaves the steamboat the heft of the stern.

The COURT: In a general way, the object of springing the hawser is to assist the steamboat in making a turn?

A. Yes, sir.

The COURT: Whether it was your duty to see to the springing of that hawser in making that turn that you did not get any special orders from the captain.

A. I always did.

The COURT: Is it your duty as mate to assist in the navigation of the boat?

A. Yes, sir; in a great many cases.

The COURT: Then do you always wait for an order from the captain?

A. Yes, sir.

The COURT: Or do you do in an emergency what your experience as mate of boats — ought to be done, without waiting for an order?

A. Yes, sir; if the captain is not present or anybody present.

The COURT: Do you say that in turning that corner that night at West Point you don't remember anything about that?

A. I could not tell you. I don't remember whether we sprung or not.

The COURT: No recollection upon the subject at all?

A. Not in that line. I could not swear to it.

The COURT: Whether you have any recollection at all upon the subject.

A. No, sir; not on that subject.

The COURT: The accident happened near that turn?

A. Yes, sir.

The COURT: Recalling to your mind at that time, as you vividly must, what occurred on that boat, tell us now that you have no recollection as to whether or not the hawser was sprung?

A. No; I have not.

99 The COURT: It ought to have been sprung in making that turn?

A. Well, the captain would use his judgment on that.

The COURT: I ask your judgment as a mate ought it to have been?

A. I don't think it had on that occasion, as far as my judgment goes.

The COURT: You don't think it was necessary?

A. No, sir.

The COURT: Why not?

A. It was ebb tide; not very heavy tow.

The COURT: Do you know whether the hawser broke or the line broke in making that turn or not?

A. I could not say.

The COURT: How long after you made the turn did you discover it was broken?

A. Probably five minutes or more; somewhere around there.

The COURT: Did you at that time form any judgment as to when the hawser broke?

A. I did not.

The COURT: I mean the line?

A. I did not.

The COURT: When would the strain have been the greatest on that line that broke—in making the turn or below?

A. Making the turn.

The COURT: Does that fact enable you to locate the time of breaking the line?

A. I could not tell whether it broke then or after.

The COURT: Whether that fact enables you to fix the probable time of the breaking of the line.

A. Yes, sir.

The COURT: What is your conclusion now?

A. My conclusion is not much about it now. I have not formed much of an idea about it. I should judge they commenced turning.

The COURT: You should judge as a boatman it broke in commencing making that turn?

A. Yes, sir.

The COURT: Do you further judge that if you judged that it probably broke in making the turn that your other judgment that it required no springing was wrong?

A. Springing of the line.

The COURT: You say you came to the conclusion that night that there was no occasion to spring the hawser?

A. Yes, sir.

100 The COURT: You further say that from the fact of the straining of the line to be the greatest in making the turn, and that you discovered it was broken after you got further down, that the line must have broken in making that turn?

A. Yes, sir; I think it was.

The COURT: What do you say, then, now, with your judgment that that line broke in making the turn, whether you were right or wrong in springing the hawser? Would not that help it?

A. No, sir.

The COURT: Would not that relieve the strain?

A. Yes, sir; relieve the heft of the steamboat.

The COURT: Relieve the strain on that line which broke if the hawser had been sprung?

A. No, sir.

Q. Weren't you asked this question on the former trial, after de-

scribing the springing of the hawser, "Does not it help to keep the strain equal on the ropes?" and did not you answer, "Yes, sir; on the two outside hawsers especially"?

A. Yes, sir.

Q. And springing the hawser would give relief to the other lines of the lines in the tow?

A. No, sir.

Q. Does not it enable the steamboat to keep the tow in better control?

A. Of course it does.

Q. Is not the purpose of the pilot in rounding West Point to keep the tow as straight as possible?

A. Yes, sir.

Q. And when the tow becomes bent does not it bring a strain on the outside lines of the tow?

A. It does; yes, sir.

Q. To the outside lines of the tow in rounding West Point on the port lines?

A. Yes, sir; coming down.

Q. The lines on the east side?

A. Yes, sir.

Q. And one of those port lines was the first line that broke that night, in your opinion?

A. Yes, sir.

Q. And does not the springing of the hawser enable you to keep the steamboat and the tow further to the west?

A. Yes, sir.

Q. Off the east shore?

A. Yes, sir.

101 Cross-examination.

By Mr. FROTHINGHAM:

Q. As soon as you had discovered that this tow was broken did the steamer turn about?

A. Yes, sir.

Q. Did it go directly back as soon as possible to the place to recover the tow?

A. Yes, sir.

Q. What part of the river was the tow in when it broke—when you first discovered it?

A. Near the center of the river, I think, as could be, about.

Q. The tow-boats were?

A. Yes, sir.

Q. About how wide is the river there?

A. I could not tell exactly to a yard or a foot.

The COURT:

Q. Tell pretty near, though.

A. It is not a great ways from a half mile.

Q. Did you leave the steamboat and go to the barge "Lee"?

A. Yes, sir.

Q. At that time had that portion of the tow been afloat some time?

A. They had been floating some distance then.

Q. How long did it take you to round the steamboat to and return to the tow?

A. I should judge in the neighborhood of 20 to 25 minutes.

The COURT:

Q. To make the turn and go up back where the Lee was?

Mr. FROTHINGHAM: Yes.

Q. When you went to the Lee whom did find there?

A. I found some men there working around her bow. I asked him what was the matter. He told me *he* was leaking; something to that effect. Say I—I asked him if she was very bad. They did not know. They thought — they would get a canvas around her bow they could go on to New York. I says, If you can't keep her afloat you better do something else.

The COURT:

Q. Said she was leaking?

A. Yes, sir.

The COURT:

Q. What next?

A. I asked him if she was leaking bad, and he said, "Yes; we are leaking very bad, but we would like to go on to New
102 York," or something to that effect. "If we get this canvas around her bow," one of them said, "we will go on to New York."

Q. What did you say?

A. I said, Al- right. Of course I had to attend to the rest of them. I left them.

Q. Did he tell you, "We were in a sinking condition"?

A. He said they were leaking. He did not say they were sinking.

Q. Did you then know that the captain was not aboard?

A. I did not.

Q. Did you suppose you were addressing the captain?

A. I did.

Q. Had the captain been aboard would you have still further looked to it?

Objected to by plaintiff's counsel—what he *attended*.

The COURT: Hardly that.

Q. You supposed the captain was aboard?

A. I did.

Q. And suppose the captain was competent to take care of the boat?

Objected to by plaintiff's counsel. It seems to me that is travelling to- far.

DEFENDANT'S COUNSEL: That is a part of the *res gestæ*.

The COURT: I don't think you can prove what he thought. You may prove the fact that the captain—that he did not know that the captain was not on board, and that he supposed he was addressing the captain.

The COURT:

Q. Did you ask them how she got aleak—ask them the cause?
A. I don't recollect if I did or not.

The COURT:

Q. How did they account for the leaking?
A. I don't believe I can get down to that. My question was what — the matter.

The COURT:

Q. You know you asked them if they were leaking or whether they told you they were leaking—you asked them if they were leaking—and were anxious to go to New York, and said they thought they would go if they got a canvas around?
A. Yes, sir.

The COURT:

Q. Did you ask whether there was a hole in her or anything of that sort?
A. I did not.

103 The COURT:

Q. Did they tell you?
A. I don't recollect that. I know they said she was leaking. Of course, at the time I had to leave them as quick as possible to get the rest of the tow together.

The COURT: The tow was getting all jumbled up together by turning around?
A. I had to watch the rest of them.
Q. Did they say in substance the words that they had all the canvas al- right and they wanted to go on to New York?
A. The answer I got was, "Get this canvas al- right, we will go on to New York."
Q. Had you been informed of the condition of the boat at that time would you have acted differently?

Objected to by plaintiff's counsel, as the same question is the one before objected to.

The COURT: I will think of that question a few moments. You may call it up again.

PLAINTIFF'S COUNSEL: If the court is in doubt about it I don't wish to press it.

The COURT:

Q. Whether if this man claims or the defense may claim that

this man was misled, if he got accurate information he would have acted different from what he did?

Objected to by plaintiff's counsel as improper, calling for the mental operations of the witness. Exception by the plaintiff's counsel.

A. I would.

Q. If you had known the captain was not aboard what course would you have pursued?

Same objection. Overruled. Exception.

A. I would have gone in the hold and looked for a leak and see if I could have stopped it.

Q. You heard Mr. Smith testify here. Suppose you found it in a condition he had testified to, what would — have done if you had known the captain had been absent?

A. I would have been down there and got anything I could have found—old clothes—stuff it in there, plank it up, hold it down.

104 Q. In your opinion, would that have stopped the leak?

A. Yes, sir; stopped it considerably.

Q. What is shoreing it up?

A. Getting a plank; get right down flat; get a long stick, a little slanting, and then drive it up.

Q. Would it have — any good to put a pillow in there and not shore it up?

A. No, sir; you must hold it; you must put something there to hold it.

Q. Would you have known the captain was not aboard, would you naturally—could you have taken her ashore at that time?

A. Yes, sir.

Q. In what way could you have done it?

A. We could run a line in the docks by Garrison's.

Q. And swung her right around?

A. Yes, sir; let go of her from the tow and hove her in; got a running line.

Q. To do that, necessary to have a small boat?

A. Yes, sir.

Q. When you left the boat did you suppose that this canvas was a sufficient protection to her?

A. I did.

Q. Would it not have been a proper protection had it been shored, etc., as you described?

A. Yes, sir.

Q. In your opinion, if she had had a competent master aboard could that have been done?

A. Yes, sir.

Q. The counsel asked you about the sinking of this boat. The sinking of the boat was some distance below West Point?

A. Yes, sir.

Q. How far below West Point?

A. About two miles and a half; three miles.

Q. After making up of the tow you had straightened out in the river and it had proceeded about three miles before she sank?

A. Somewhere around there.

Q. About how long did that occupy?

A. In the neighborhood of three hours and a half.

Q. In that time had you had any alarm or any notice that there was any danger of the boat sinking?

A. No, sir.

Q. Had you on the steamboat heard any call from this boat for assistance?

A. No; not until we cut away below.

105 Q. If you heard the captain of the boat say he would not help him?

A. No, sir.

Q. Any such thing?

A. No, sir.

Q. Had you said so?

A. No, sir.

Q. Nor anybody aboard the steamboat?

A. No, sir.

Q. Did you tell Brousseau, this witness on the stand that you heard, to do? Did you tell him that you could not do anything for him?

A. No, sir; I did not.

Q. At that point on the river was there any difficulty in seeing the lights of the steamboat?

A. No, sir.

Q. From the tow?

A. No, sir.

Q. At any time between the time the tow was disconnected up to the time when you came back was there any difficulty in seeing the lights of the steamer from the tow?

A. No, sir.

Q. The course is straight for several miles?

A. Not as far as that; it is quite a distance.

Q. In your opinion could that boat have been anchored below there—a short distance below—beached and anchored?

A. Yes, sir; that might have saved it also.

The COURT: Where?

A. In behind the place we call Flat Rock dock we might have let go her anchor.

The COURT: Where is that?

A. About a mile, I guess, below Garrison's.

The COURT: You weren't there?

A. Yes, sir; when we swung around, when we got swung around, the tail end of it was there.

Q. In your opinion, from the proper appliances—she had her master aboard—could she have been run out of the tow and ran on a beach?

A. Yes, sir.

Q. Is it frequently the case that boats are left in the middle of the river—that is, barges of the character of the Lee—to take care of themselves?

A. No, sir.

Q. How does a boat leave the tow to run in a port where she is not going through?

A. Sheered off on a running line; get a line on the outside boat; sheered off and goes in there the way she goes in a tow; sometimes she will go a half mile before she stops.

106 Q. In your opinion, if she had had competent navigators, could that have been done?

A. Yes, sir.

Q. In your opinion was everything done that was possible by you and this steamer to save this boat?

A. It was.

Q. When did you first know of this old line?

A. When I came back to tie them up.

Q. Had you any knowledge or suspicion that there was any old line used there?

A. I did not.

Q. Up to that time?

A. No, sir.

Q. Had you known of any such line when the tow was made up at Albany?

A. No, sir.

Q. Had you known it would you have allowed her to proceed with such a line?

A. I would not.

Q. Is it frequently the case, within your experience and observation, that these tows are made up in Albany with sufficient lines and the lines changed by the boatmen afterward?

PLAINTIFF'S COUNSEL: It seems that is going into the regions of romance a little too much.

THE COURT: If this witness had sworn that this line was a good line when it was put fast it would be a different thing. He has not sworn to that; he says he don't know. You cannot assume that this man made an inspection of the lines and saw them good, and afterward, because there was an old line found that had been put on there by some boatmen, that the lines had been changed; that would be a violent assumption. I will rule that out. It would be dangerous for a jury to guess that this line had been once changed.

Defendant's counsel excepts.

DEFENDANT'S COUNSEL: We propose to show that these lines are furnished by the boats that are towed; that it is the practice of the owners of boats to impose upon the captains of barges of lines for the purpose of tying together their boats; that for the purpose of saving their lines they are frequently changed, and whenever it

107 has come to the knowledge of this mate he has caused them to be replaced with good lines; that he has known of repeated

instances where good lines have been used in making up the tow and immediately afterward they have been changed by the boatmen. We offer to show this, that we are not responsible; it is impossible for us to be responsible for the condition of these lines used by these men; that the safety of these tows is liable to be jeopardized any moment by the changing of these lines.

The COURT: It would be very unsafe indeed to allow this jury to presume merely because boatmen would sometimes change lines that this line when it left Albany was a good one, or rather the line which fastened this boat was a good line, and that on the way it was changed. To begin by proving that when the boat was made up in the tow, that was another question. I understand this witness to say he did not inspect all the lines at Albany.

Defendant's counsel excepts.

Q. Did Mr. Ableman inspect the lines?

A. Yes, sir; he generally does.

The COURT: Did he on this occasion?

A. He does on all occasions.

The COURT: That does not answer the question. You do not know on all occasions.

(Not answered.)

Q. Did you see him do it on this occasion?

A. His general custom to do it, I suppose he was doing it then. As far as my recollection, I saw him possibly done that; I could not tell.

Q. Did you know that there was any bad line used that night?

The COURT: That he had sworn to. The first knowledge he had of the bad line was when he went on the boat after the breaking of the tow.

Q. Describe the condition of this line when you found it. How was it—a bad line?

A. An old-looking line outside, but looked good inside.

Q. Can you determine the character of a line because of its old appearance?

A. Not always.

108 Q. Do you frequently find the strong lines among those that look old?

A. Yes, sir.

Q. How soon after the line is used does it begin to look old?

A. It depends upon how they are taken care of.

Q. O, generally?

A. Generally look old in a month's time; sometimes look new after having them aboard the boat for six months.

Q. This was one of the spring that you discovered to be bad?

A. Yes, sir.

Q. Do those lines sometimes chafe on the boat?

Objected to. We have no evidence that this line chafed.

The COURT: I think they may prove that fact.

Q. How is that?

A. Of course on the boat's bow is iron. There is round iron over the bow of the boat like this right on the edge both sides, and then there is iron on the stern. Of course a man don't take any interest in his line. He lets it lay there. Others put old boot legs, what they have just about; lay in their lines going up and down the river.

Q. Could you have told this line was unsafe until after it was broken?

A. I could not.

Q. What is the length of the hawsers of your boats, generally, when they are out?

A. In the neighborhood of 95 or 100 fathom.

Q. Six feet to a fathom?

A. Yes, sir.

Q. What was the length of these tiers of boats on that night from the tail of the tow to the steamboat?

A. I suppose in the neighborhood of, I should judge, 200 fathom.

Q. Could you distinguish any call at that distance?

A. No, we could not. We could hear them holler about something; could not tell what a man was saying.

Q. Any signal lights swung before you on this occasion?

A. No, sir.

Q. None whatever?

A. No, sir.

Q. Do you generally get notice in the tow by signal lights?

A. Sometimes. Sometimes they holler for us.

109 Q. After you get under way with your steamer is there much strain upon these lines—these lines connecting the boats together?

A. Well, there is on the tier or two. After that it lessens up all the while. Further back the less strain there is on them.

Q. When your boat is in motion there is less strain than there is when you first start?

A. Yes, sir.

Q. Do you know what boat it was that passed to the eastward of this tow?

A. I don't recollect.

Q. It was a steamboat?

A. Yes, sir.

Q. In your opinion, was the steamer on this occasion managed with caution and skill?

A. Yes, sir.

Q. Was she in a proper position in the river?

A. Yes, sir.

Q. Was it managed in the manner usually employed on such occasions?

A. Yes, sir.

Q. That was not an unusually large tow for this steamer?

A. No, sir.

Q. This springing of the hawser, the necessity of the springing of the hawser, is determined by the captain?

A. Yes, sir; pilot and captain both consult between them.

Q. They are the officers who determine the necessity of springing?

A. Yes, sir.

Q. Is it frequently left undone on an ebb tide with a tow of that size?

A. Depends upon the tide.

Q. Ebb tide?

A. Ebb tide is frequently left undone.

Q. Why is it left undone?

A. Because we can keep the steamboat in a proper position in the middle of the river as can be without it.

Q. In your opinion, is it done for the purpose to enable the pilot to steer the boat better; easier?

A. It is not to relieve the pilot of his steering as it is to keep the steamboat and the tow in the proper position in the river and save it from drifting from one way or the other shore, getting afoul of anything.

Q. In your opinion, was these two young men on this boat a sufficient crew for a barge laden as that barge was?

A. I would not consider that so.

110 Q. What is the usual crew for such a barge?

A. Three men generally.

Q. At night when the tow is in motion how did you determine when you are on the steamboat the position of the tow? Do you determine the position of the tow at night by signal lights?

A. Bright light on the tow on each outside boat.

Q. One light on each boat; outside boat?

A. Yes, sir.

Q What lights are those that are usually kept on the tow?

A. They are made; kept on there; first bright, globe lights.

Q. On the outside of the tow?

A. Yes, sir; generally on the outside boat or next to it; generally on the outside boats.

Q. One light?

A. Yes, sir; on each boat.

The COURT:

Q. This point where this boat must have struck, if she did strike, where was that, just below West Point?

A. No, sir; above West Point.

The COURT:

Q. What is there to strike on?

A. Quite a rocky shore there.

The COURT:

Q. How close must she have been to the shore to strike on the rocks?

A. Probably two or three feet.

The COURT:

Q. Did you ascertain that another boat had struck before on those rocks that night in the tow?
A. No, sir.

The COURT:

Q. Never heard of that?
A. No, sir.

The COURT:

Q. How close to the shore was this boat when you took her in tow again?
A. She was quite a ways from the shore.

The COURT:

Q. How far?
A. I should judge about two or three hundred yards; no, about 150 yards.

The COURT:

Q. In going down the river with an ebb tide, in making that turn of West Point, where would the current carry the boat?
A. It would depend upon where she was.

The COURT:

Q. Ordinarily in making that turn in which direction?
111 A. If she had made the turn she would drift a little towards down to this Boathouse point to the east shore. If she had not made the turn she was right in on the flats above the point.

The COURT:

Q. These rocks of which you speak, was that Boathouse point?
A. Yes, sir.

The COURT:

Q. She was about 150 yards from shore?
A. Not then; below that when I got there.

Judge MCLELLAN:

Q. Boathouse point; is that below West Point?
A. No, sir; it is in about southeasterly direction from West Point.

Judge MCLELLAN:

Q. In coming around the West Point there is two turns to make?
A. Yes, sir.

Judge MCLELLAN:

Q. If this boat had broken loose in coming around the first turn, where would the boat have gone, left to itself?
A. Went down on West Point docks.

Judge McLELLAN:

Q. If it got loose making the second turn, where would it have gone?

A. Went down above Boathouse point.

Judge McLELLAN:

Q. There is a shore where it would have gone among shallow water?

A. Yes, sir; on the mud.

The COURT:

Q. How do you prove that—why?

A. Because that was the action of the tide.

The COURT:

Q. What is your first turn?

A. Coming around this way, eastward.

The COURT:

Q. Going southeast?

A. Yes, sir.

The COURT:

Q. When you turn to the southeast the swing is in that direction. Why won't she bring up on West Point dock?

A. The ebb tide would send her down on there—I mean on the upper side of the point; the first turn is on the upper side, Powder-House point.

The COURT:

Q. You turn to the southeast; why don't she strike over on the west shore? The impetus is to the southeast that the boat gets from the steamer?

A. Yes, sir.

The COURT: Why is it she would not go in the direction with the wash coming from the steamer—why she would not go to the west?

112 A. Because the action of the tide sets right straight down there before it turns to the east; goes to the west point.

Judge McLELLAN: The current of the river going down sets to the west shore?

A. Yes, sir.

Judge McLELLAN: That would take the boat there if she broke loose?

A. Yes, sir; even if she did not break loose the tail end would go on that Government dock.

Judge McLELLAN: It is the same, too, at West Point there. If the tow was not in proper position, the tail end or some part of it would swing down on this flat above Boathouse point?

A. Either that or on the upper end of Boathouse point.

Judge McLELLAN: In going around that point is there any water pressure upon these lines more at one time than another?

A. No, sir.

Judge McLELLAN: There is no more strain in turning the point than there is where they don't turn?

A. On the first tier or second tier there is.

Judge McLELLAN: Now, the part that the tow-boat furnishes—something they call a bit?

A. Yes, sir.

Judge McLELLAN: The timber that runs the whole length of the head of the tow?

A. There is bits on the boats; we have bits.

Judge McLELLAN: But what is that, and where is it?

A. It goes right down through the keelsome of the boat, all through her timbers, to fasten below; there is a windlass, I think, for the purpose of heaving the boat up.

Judge McLELLAN: I mean the boat at the rear end of your hawsers, where the first tier of boats in the tow is attached; is not there a timber goes across?

A. No, sir.

Q. Is there anything there to keep them even?

A. Yes, sir; spring lines left in that shape.

Q. Those spring lines that cross in this way—that keeps them in line?

A. Yes, sir; that keeps that in position so they can move ahead of one another from the lines. Each one has a line, one
113 leading one way and the other the other way. They cross in that way (indicating); that keeps those boats from see-sawing; that keeps the whole tier so they cannot sheer.

Judge McLELLAN: That is, the canal-boat has spring lines?

A. Yes, sir.

Judge McLELLAN: When you spring the hawser, as it is called, you connect the hawsers by your spring lines, and change the point where it is connected with your boat for the draft?

A. Yes, sir; we changed it from the bit of the steamboat down to the side checks.

Judge McLELLAN: And on the side on which you wished to turn?

A. Yes, sir.

Q. Do these boats behind you equally all the while the strain is not changed by springing the hawser?

A. No, sir.

Redirect examination.

By Mr. ANDREWS:

Q. When you went back to pick up the broken part of this tow—where did you say the tow was that was broken off?

A. West, below Garrison's.

Q. Whereabouts in the river do you say it was; how far from the east shore?

A. The tail end was some, probably, hundred yards away.

Q. Where was the rest of it?

A. Pretty close to the shore, below it.

Q. From the position that broken part of the tow was in where, in your judgment, did this Lee get the hole knocked in her?

A. She must have got it at Boathouse point.

Q. The lower end of this detached portion was close by the shore?

A. Yes, sir.

Q. Did you give the distance?

A. Where the Lee was, it was.

Q. The other, you say, was close to the shore?

A. Yes, sir.

The COURT: You say that if she got a hole in her at all she must have got it at Boathouse point?

A. Yes, sir.

114 The COURT: If she got that hole at Boathouse point, what conclusion do you draw from that as to whether or not the line was broken before that or not?

A. Of course she was close to the shore before that. The portion that broke loose was closer to the point there.

The COURT: If she got her hole at Boathouse point, and you found the line of one of those boats broken, what conclusion do you draw as to the time when that line must have broken?

A. My conclusion is it broke after we got around the point.

The COURT: How do you account for the fact, then, that the boat got a hole knocked into her on Boathouse point?

A. Because the boats drifted over to the east shore.

The COURT: They drifted to the east shore with the hawser broke?

A. No, sir: they could not do that.

The COURT: What conclusion you formed as to the time when the line broke?

A. The line broke after we got straightened around West Point.

The COURT: Before the rear had passed the point?

A. Yes, sir.

The COURT: Then the line must have broken after the boat had passed around West Point and before the tow had passed?

A. No, sir; I mean after the tow had passed the point; straightened down.

The COURT: How, then, do you account, with the tow all perfect, the line unbroken, that this boat got a hole knocked in her on Boathouse point?

A. She sagged over to the east shore after the tow had broken. The tide carried over to the east shore.

The COURT: You conclude that the cause of the boat getting a hole knocked in her at Boathouse point was the breaking of the line?

A. Yes, sir; it must be certainly that caused the whole tow breaking up.

The COURT: Because the line broke she must have drifted that way?

A. Not that port line, but the whole of them that broke; there came more strain on the rest of them.

115 Q. Please to give your judgment as to what caused the line of the vessel on the east shore—the lines of the vessel on the east side—to break; what caused that, in your judgment?

A. In my judgment they had been seeing-sawing down from Albany, on the way down, and, in my judgment, had given out; cut, wearing out.

Q. Did you see anything of that?

A. No, sir; that is my judgment.

Q. But without any facts?

A. O, I guess that is my judgment.

Q. Would not it be a little more reasonable to put it on a ground of an extra strain?

A. No, sir; not on that occasion.

Q. You think there were two lines of this boat that broke—port boat?

A. Yes, sir.

Q. Which broke first—the poor one or the good one?

A. That I could not tell.

Q. Could not tell from the appearance at all?

A. I could not tell.

Q. Although you looked at them?

A. I did.

Q. Their breaking on that side, on the port side, would indicate that the tow was then in a semicircle on that side—on the port side?

A. Not when it broke.

Q. Would not that be the ordinary condition in going around West Point, that the tow would be in the shape of a semicircle?

A. Yes, sir.

Q. But you thought when it broke it would not be? Now let us see. Suppose if the tow broke apart right opposite West Point, where would it have drifted to?

A. On the upper end of the Boathouse point.

Q. That is where you think it did drift; then why is not it more reasonable to say that it probably broke from an extra strain on that side than put it on a ground you know nothing about?

Objected to—argument with the witness asking him why it is not more reasonable.

The COURT: I think that is proper; he has a right, by a question argumentative in form, to see whether it will change his opinion or not.

116 Exception by defendant's counsel.

A. Of course I know there was no extra strain at the time.

Q. You know there was no extra strain?

A. No, sir.

Q. Well, assume that this is the shape (piece of legal-cap paper) of the channel around there, around West Point, and that the tow is coming around.

A. Yes, sir; not quite a circle as that.

Q. That is rather sharp?

A. No, sir.

Q. We will call it just in this way, and the ropes or lines on the port side are tighter drawn than those on the other side, are they not, while the tow is in this circle?

A. Yes, sir.

Q. They are tighter?

A. There is if they are kept.

Q. The tide setting on this side?

A. No; in the circle.

Q. Here is the steamboat off here, and the lines would be tighter on the east side?

A. Yes, sir; if they steady pulled on them.

Q. If the tow got parted near the east side and the pilot on the steamboat saw it, he would be apt to put a little extra pressure to pull the tow away?

A. No, sir; he would not.

Q. If he stopped his boat going around while the tow was opposite, between West Point and Boathouse point, why, then, the tow would drift on Boathouse point?

A. Yes, sir; if he left it drifting.

Q. If he stopped his boat entirely while the tow was passing the tail end of the tow between West Point and Boathouse point, why, then, the tail end of the tow would drift on the rocks?

A. Yes, sir.

Q. Suppose the boats got down pretty close there.

A. Yes, sir.

Q. And they were going along, not stopping, the natural drift of the tide would tend to endanger those boats?

A. Yes, sir.

Q. That is the reason you spring the hawsers, so as to avoid going too near those rocks?

A. Yes, sir; before we get in such a position.

Q. I suppose a great many accidents have happened there?

A. I don't know. Not a great many.

117 Q. Find it necessary, however, to take this precaution?

A. Yes, sir.

Q. About the only one where the hawser is sprung?

A. O, no.

Q. How many places is it customary to spring the hawser?

A. We got sometimes to spring around Powder-House point; spring around Kid's point; sometimes coming around the Nose.

Q. In ordinary weather, when there is no wind and when the river is smooth, in ordinary weather, how many places, then, during the whole river from Albany to New York, do you spring the hawser; how many are there that you would think?

A. I think it is four places we got to use it very frequently.

Q. Do you use it generally at these four places?
A. It depends upon the tow and the tide.
Q. Calm weather?
A. Tows and the tide have got to do it.
Q. How is the fact as to whether you usually spring the hawser in going around West Point?
A. We always have to be ready in case we want to use it.
Q. Do you generally?
A. Not always.

The COURT:

Q. Generally do you spring the hawser?
A. Depends upon the tows and the tide.
Q. Where with a tow of this size?
A. No, sir.
Q. Did you swear on the former trial, in answer to this question, "Do you generally spring the hawser in going around West Point"—did you swear yes?
A. Yes, sir; probably did.

Recross-examination.

By Judge MCLELLAN:

Q. The lines on the port side are tighter in going around this circle?
A. There is a tide carrying this in the inside; turning around the tide is inside that circle.
Q. Whatever tightness is occasioned by the tide?
A. Yes, sir.
Q. Not by the draft of the boat?
A. No, sir.
118 Q. How is that tide going around that turn?
A. Down to the east shore from the point. Here is the tide coming back against this boat inside the circle, carrying, as the tide swings her—the tide swings her—further, the tail end of the tow.

Redirect examination.

By Mr. CADY:

Q. How long you stayed on the Lee when you went back to her and had this conversation you have spoken of?
A. I could not tell exactly; in the neighborhood, probably I would say, some 10 or 15 minutes.
The COURT: On the Lee?
A. No; on the boat next to her.
Q. You did not go on the Lee at all?
A. No, sir.
Q. I thought you said you went on board of the Lee?
A. I don't think I did.
Q. You were on the light canal-boat alongside?

A. I guess there was no light boat alongside of her.
Q. What kind of a boat?
A. That was a loaded boat, pretty even with her deck.
Q. What kind of a boat?
A. I could not tell.
Q. You did not take the trouble to go on the Lee?
A. No, sir.

Recross-examination.

By Mr. FROTHINGHAM:

Q. You had the conversation with the men on the Lee?
A. Yes, sir.
Q. On the deck of the boat which was just the height of the Lee?
A. Yes, sir.

Redirect examination.

By Mr. CADY:

Q. You say you did not go on the Lee at all. You stood on this other canal-boat. You stood there 10 or 15 minutes. Have you told all the conversation you had while you stood on that canal-boat?
A. I think I have.
Q. What were you doing the rest of that 10 or 15 minutes?
A. Taking care of that tail end where it was swinging.
119 Q. Where was that tail end?
A. Close in shore.
Q. Did not you just swear that it was 100 yards out in the river?
A. Yes, sir; when I got there.
Q. Within 15 minutes it drifted close in on the rocks?
A. Yes, sir.
Q. And within 15 minutes—10 or 15 minutes—you say this last tier of boats drifted, from a point 100 yards out in the river, close in on the rocks?
A. Yes, sir.
Q. In that time how far down the river had she been drifting?
A. From the time when I got there the tail end of her was just below Garrison's docks.
Q. And out 100 yards in the river?
A. I don't know exactly 100 yards; quite a ways off the docks.
Q. When you got back there, which was nearest to the rocks, the front tier or the rear tier of boats?
A. The front tier.
Q. Was nearest the rocks?
A. Yes, sir.
Q. You were sworn on the first trial of this case?
A. I was.
Q. Did you or did not you testify that you stood there—you did not say where—until the captain hollered me to tell me to watch the last tier, because that was nearest the shore?

A. Yes, sir.
Q. Then the last tier was nearest the shore?
A. It was when it swung around.
Q. Then the last tier was close in on the rocks?
A. Yes, sir.
Q. Where were you standing when you hollered to the captain and told — to get the last tier off the rocks?
A. Standing on this canal-boat, on the stern of her.
Q. Did not you go on any other canal-boat in the tow than this one?
A. Yes, sir; I went the whole length of the tow.
Q. How did you come to take your stand next to the Lee?
A. Because I was telling the captain how to go ahead or stop.
Q. How could you do it better at that point?
A. Because that was nearest the shore.
Q. Was not the Lee nearest the shore?
A. I stood right by her.
120 Q. You say you went back there because that boat was nearest the shore. I ask you if the Lee was not nearer the shore than that boat.
A. Probably a foot or two.
Q. Why did not you go on the Lee, then?
A. I took my position—I think it was where I could observe everything.
Q. Did not you think that the Lee was in a sinking condition, and did not you want to keep off of her?
A. No, sir.
Q. You can't give any other reason than that not going on board the Lee?
A. No, sir.
Q. In that 15 minutes that this tow was drifting 100 feet on the shore, how far down the river had she drifted?
A. Probably a quarter of a mile.
Q. In 15 minutes?
A. That is about it.
Q. Probably. I want your best judgment.
A. I should judge just about as far as yards, feet, or inches. I do not know; I should judge in the neighborhood of 100 fathom; the length of our tow, just about; from the time I got there until I got the tail end clear of the shore; we got the tail end clear of the shore just about the length of the tow.
Q. Was that a quarter of a mile?
A. No; I don't suppose it was.

Recross-examination.

By Mr. McLellan:

Q. Your business was there to see about getting that tow together—to get it off again?
A. Yes, sir.
Q. And this position that you took after your interviewing the par-

ties on the Lee was for the purpose of seeing the rear end of that tow—to watch its proximity to the shore?

A. Yes, sir.

Q. While the steamer was turning at it?

A. Yes, sir.

Q. It would have to be turned to the west?

A. Yes, sir.

Q. That is the reason you took that position in the rear?

A. Yes, sir.

Q. Done in pursuance of the orders of the captain to see about the last tier?

A. Yes, sir.

121 Q. As that, in swinging around, would naturally come closer to the shore than any other?

A. Yes, sir.

Q. And give you cautions in regard to it?

A. Yes, sir.

JOHN SALISBURY sworn in his own behalf.

Examined by Mr. ANDREWS:

Q. Where do you live?

A. I live in Athens.

Q. Was you the owner of the barge at the time of the accident—the Lee?

A. Considered so; yes, sir.

Q. Was you at Schodack creek during the day that the Lee started?

A. I have forgotten whether I was that day or went away that night before. I think I went away the night before—the day before she started around.

Q. Had you been accustomed before that to having boats towed to New York?

A. Yes, sir.

Q. How long had you followed the business of taking brick and other commodities to New York before this accident?

A. Somewhere about 10 or 15 years; maybe longer; well, 30 years.

Q. What tow-boat line do you generally employ to tow your vessel to New York?

A. Mr. Schuyler's line.

Q. Had you any arrangement with them on this occasion to tow your barge to New York?

A. I had arrangements to tow her the season right through.

Q. Had arrangements of that kind with the company?

A. Yes, sir; I generally made an agreement.

Q. How did they find out that evening that you wished to leave for New York? How did they know that you wanted to go that night?

A. I think I telegraphed her. I am not sure. I either did or left word to telegraph by some of the men.

Q. At any rate, there was a tender that picked up these boats?
A. Helpers.
Q. Did the helper of the Schuyler line come around and take you to the tow-boat?
A. At New Baltimore.

The COURT:

Q. What was the name of the boat?
A. Winants.
122 Q. The "Willie," was that their boat now?
A. No, sir; she was not. She did not belong to Schuyler that I know of. She was a helper.
Q. What was your barge loaded with that day?
A. With brick.
Q. And do you know about the quantity that was aboard?
A. All I know is Mr. Brousseau said about how many brick he had on.
Q. Had not you taken brick a great many times?
A. Yes, sir.
Q. Could not you tell from your experience the way the boat was loaded how many brick there was aboard?
A. I should judge she had 127,000 brick, the way we stowed the brick.
Q. You was taken in tow by the Niagara?
A. Yes, sir.
Q. At New Baltimore?
A. Yes, sir.
Q. Who gave you position in the line?
A. I think it was captain of the Winants—Captain Cunningham.
Q. He put you where?
A. He put me on the east side of the tow—on the east latter end of the tow.
Q. Do you know any reason why you were not put on the other side?
A. No, sir; I don't know any reason.
Q. Nothing was said about that to the captain of the Niagara or anybody in charge?
A. Nothing was said when he picked me up.
Q. Had this boat Winants put you in tow before on the Schuyler line?
A. Yes, sir; a great many times.
Q. Captain Cunningham is the captain?
A. Yes, sir.
Q. Did you have any directions about the necessity of going yourself—accompanying your barge to New York yourself?
A. No, sir.
Q. Ever have any directions of that kind from the Schuyler line in all these 15 years?
A. No, sir.
Q. Had you been to New York frequently with your barge?
A. Yes, sir.

Q. How is the fact as to its having gone frequently without your being aboard?

A. Yes, sir; she has gone frequently without my being aboard.

123 Q. How long had you run this barge before you went down this time?

A. I think about 9 or 10 years.

Q. Always towed with the Schuyler?

A. Always in the Schuyler line; perhaps once or twice with some other line when it was inconvenient for them to take me.

Q. What happened when you got to Athens?

A. I went ashore there.

Q. Have you ever known anything about the manner of navigating tows around West Point?

A. Yes, sir.

Q. How did you acquire your information?

A. I have seen them—been alongside the steamboat with a barge—seen them spring the hawsers.

Q. What has been the custom of the Schuyler line when you have been with them in respect to springing the hawser in going around West Point?

A. They most always spring the hawser on ebb tide when I have been with them.

Q. (Diagram shown witness.) When was that made?

A. That was made last night.

Q. Is that according to the points of the compass, now?

A. Yes, sir.

Q. Now, on this wide line, here is the Hudson river?

A. Yes, sir.

Q. That point?

A. Is West Point.

Q. Is this about the direction of the river as it winds and curves around West Point?

A. This is the way to come around here down this way. There is West Point; there is Boathouse point.

Q. Boathouse point is out east from West Point?

A. A little southeast.

Q. By the West Point you mean where the light is?

A. Yes, sir; and here is the buildings, that I suppose West Point.

Q. Commencement of Boathouse is a little below at east-and-west line drawn through West Point?

A. Yes, sir; the Boathouse point is a little southeast.

Q. This represents the tow coming around this steamer—that is, the hawser that connected it with the steamer?

A. Yes, sir.

124 Q. Where do they commence the springing of the hawser?

A. I could not tell exactly. All I know about it, I saw the hawser generally sprung around here.

Q. It is sprung?

A. It is put on here above.

Q. When they go around it is sprung?

A. Yes, sir; they generally have it on before they get around ready to spring, and then they generally spring it here.

Q. This represents again the tow broken in two?

A. Yes, sir.

Q. What is the direction of the tide of this point between West Point and Boathouse point when it is ebb tide?

A. It sets right down on Boathouse point.

Q. And was the tow broken in two the whole of the tail end would naturally go towards that point?

A. Boathouse point—it is a point of rocks where they keep a little house to keep little boats in. Here there is rocks all along here.

Q. How long do the rocks extend?

A. Clean down to Garrison's.

Q. How far do you make that from the commencement of Boathouse point on the north down to Garrison's—about how far in distance?

A. I should think it was about a mile from Boathouse point to Garrison's, as near as I can get at it.

Q. In going around West Point what is the usual practice in respect to keeping far or near—whether they get away down below here or near?

A. Near this point; near to the light.

Q. What do they spring the hawser for?

A. The tide sets the tail end of the tow.

Objected to question. He is not competent to give an opinion about it.

The COURT: You know the object of springing the hawser?

A. Yes, sir.

Q. You have been on sail vessels?

A. Yes, sir; for years.

Q. Tell us what is the object of it.

A. The object is springing the hawser was to turn the boat
125 where they can't steer the boat very well, so as to turn the boat eastward and pull the boat off the east shore off those rocks.

The COURT: I understand the springing of the hawser consists so that the boat takes the strain from the stern boat — some other part?

A. Yes, sir.

The COURT: Where would you make the place?

A. On the west side in the chock on the side.

Q. What distance by the steamer?

A. It might from the stern, maybe 75 or 80 feet, maybe a little further.

Q. That is on the Niagara?

A. Yes, sir.

Q. How long is she?

A. I could not tell; she might be 300 feet, maybe longer.

Q. Can she control usually the tow going around West Point? How is the fact about the steamer being able to control a large tow in going around West Point without springing the hawser?

Objected to by defendant's counsel. I assume that the witness has not been proven competent to give an opinion as to the conduct of steamers in using tows.

(Not answered.)

Q. In respect to the manning of these tows that are taken down by Schuyler's line, are they seamen that are acquainted with the various shores, quicksands, and rocks upon the Hudson river usually; I mean the men on the tows; the boats that come down the "raging canal," how are they manned usually?

A. Sometimes they have one man and a woman aboard, sometimes have two men on these boats.

Q. Ever require you to have seamen on board that understood the requirements of various rocks on the river?

A. No, sir.

Q. Did you ever know any such requirements to be made?

A. No, sir; never.

Q. What is the class of men that are generally on board—men that are accustomed to navigate the Hudson river or the Erie canal; any tows down on Schuyler's line?

A. They are accustomed to navigate the canal and also the Hudson river.

126 Q. That is after they get down to river?

A. Yes, sir.

Q. Do they have anything to do with navigating the river?

A. No, sir.

Q. The tows, they are all fastened together?

A. Yes, sir.

Q. Is there anything that the men can do there in the way of navigating the vessels?

A. No, sir.

Q. Do they use—do they have sails?

A. No, sir.

Q. How are their rudders generally fixed?

A. It is no use, and lash the rudder; they do not mind the rudder; the dead water in the other boats; the rudder don't have no effect; even if you do put it over it has no control of the barges, because they are tied up.

Q. So that practically you would not think it at all necessary to have a man of any skill in navigating the river in a tow?

DEFENDANT'S COUNSEL: Objected to on the ground that the witness is incompetent to answer.

The COURT: I think he is competent.

Exception by defendant's counsel.

A. All I know about it, any man that can make a line fast and can pump knows how to steer a boat; that is all that is needed.

DEFENDANT'S COUNSEL: Same objection is made to this question. Exception by defense.

Q. How long you had owned this boat Lee?
A. I think it is about 12 or 13 years.
Q. And she was wrecked before she sank?
A. Fifteen or sixteen years; maybe more; I can't recollect now how many years.
The COURT: Was she raised after this accident?
A. Yes, sir.
Q. Did you see her afterward?
A. Nothing more than what I was told.
PLAINTIFF'S COUNSEL: I don't ask that; I move that be stricken out.
The COURT: Yes, sir.
Q. You never saw her after the accident?
A. I never seen her after the time she was sunk.
127 Q. Knew nothing about her being raised except from hearsay?
A. No, sir.
Q. Did you hear what became of her?
A. I heard Mr. Schuyler raised and lost her; the chains broke and she sank again.

DEFENDANT'S COUNSEL: I move to strike the whole out.
PLAINTIFF'S COUNSEL: I consent to it.
The COURT: I strike out all that evidence.

Diagram offered in evidence marked "Ex. A, C. P. B., Apr. 22d, 1884."
Diagram objected to by defendant's counsel—not proved to be accurate—and move to strike it out.

The COURT: Is that diagram substantially accurate of the river?
A. Pretty near; as near as I can get.
The COURT: You are familiar with the river there?
A. Yes, sir.
The COURT: Have been for a good many years?
A. Yes, sir; been up and down with the sail vessels.

Defendant's counsel objects to the diagram further on the ground that the tows in there are only imaginary.

The COURT: That is to say that the steamboats and appendages to them represented on that map are designed to show the positions to a steamboat and the tow in making that turn?
A. Yes, sir.
The COURT: Those positions are the results of observations which you have made and seen?
A. Yes, sir.
The COURT: Seen that actually occur?
A. Never saw one broke in two.
The COURT: This is designed to represent the first turn of the boat?

A. Yes, sir.

The COURT: This is after the turn is made?

A. Yes, sir.

Judge MCLELLAN: Is not it designed to show a tow broken?

A. Yes, sir.

Judge MCLELLAN: Did you ever see a tow broken there?

A. No, sir; designed to show what the position would be in case the tow broke.

DEFENDANT'S COUNSEL: Objected to as incompetent and im-
128 proper and not sufficiently proved, not accurate; don't pretend to be a drawing; a large part of it that the witness ever saw.

Mr. ANDREWS: I think that diagram is proper. He states about where the different points are, and he states the usual course of vessels in coming around, and represents what a break in a tow would be; not this particular tow broken, but the usual way in which they come around.

The COURT: I will receive that map in evidence for the purpose of showing the general course of the river according to the witness's recollection and the position of a tow it ordinar-y takes in making that turn, which he says is also the result of actual observation by him, so far as that map may be designed, or its representing a tow in the act of breaking, it is not any evidence upon that point. It simply shows where a tow might break. I will receive that map. The jury are told now this is not the representation of an actual occurrence; simply designed to show how a tow would get around the point.

Exception by defence.

It is hereby stipulated by the attorneys for the respective parties in making this case that the diagram marked "Ex. A, C. B. P., Ap'l 22d, 1884," need not be attached to the case and a copy thereof need not be printed or represented in the printed case, and that on the argument of any appeal in this action either party may exhibit to the court the original diagram, and use the same as if it had been attached to this case.

CADY & HOYSRADT,
Plaintiff's Attorneys.
W. FROTHINGHAM,
Defendant's Attorney.

Cross-examination by Judge MCLELLAN:

Q. What was the tonnage of this barge? You was sworn on the first trial?

A. Yes, sir; I think I was.

Q. You was not sworn on the second?

A. No, sir.

129 Q. Although you were here in court during the trial?

A. Yes, sir.

Q. The tonnage you testified was 105?

A. That was right; custom-house tonnage, 105. I think that is the way the papers was.

Q. And this barge was a barge that drew about six feet?

A. She drew seven feet—a little over seven feet.

Q. And about what was the width?

A. About 23 feet deep.

Q. About what was her length?

A. I think 98 feet, as near as I can recollect.

Q. You said you had been in the habit of towing with the defendant's company for 14 or 15 years?

A. About 12 or 14 years. I could not tell exactly how long.

Q. For how many years have you towed with the steamer Niagara?

A. I could not tell how many; several times; a good many times.

Q. How many years back, before the boat sank, up to this time?

A. I must have towed in the line one boat or the other. I have towed with the Niagara a good many times, but I could not tell how many times.

Q. How many years before this occurrence in 1876 you had towed with the Niagara?

A. I should think I had known two or three or four years; that boat I have known three or four years.

Q. Did she have the same officers of the boat while you towed with her all the while until this occurrence?

A. That I can't say.

Q. You don't know?

A. No, sir.

Q. You have gone frequently in tow with this line—that is, your boat had when you did not go along?

A. I could not name the boat that took me or the year, because there was a great many trips to make in a year.

Q. Can you name the officers of the boat that took your boat when you did not go along?

A. I can't remember.

Q. Can you name men in authority over the tow that took your boat that knew you did not go with it?

A. Not positive. I could not say at all. All I know I sent her down there without my help.

130 Q. You did this time?

A. Yes, sir.

Q. And did you know that Brousseau had never been on a tow-boat before; I mean as a hand—navigator; going to New York on a trip with one before?

A. No, sir; I did not know it.

Q. Did you know that Smith had never been on the boat as a navigator until that time he went with you?

A. He had been more than that before.

Q. He had not been there but a month. Before the time he was employed to go on that boat, the Lee, had you known that he had never been on one before as a hand?

A. I don't know that he had.

Q. You never commanded a steamer?

A. Yes, sir; I have been pilot of a steamer, piloting her up to Albany.

Q. Where from?

A. Down the river.

Q. Whereabouts down the river?

A. I think from New York.

Q. More than once?

A. I recollect once I did.

Q. And that you consider management of a steamer—commander of a steamer?

A. Of course I cannot command a steamboat.

Q. Acting as a pilot on a steamboat once you consider would be acting as commandant of a steamer?

A. I was acting as that.

Q. You was the only captain aboard?

A. I had the control of her entirely.

Q. There was another captain?

A. None capable of taking her up.

Q. You took her up?

A. Yes, sir; it was in the time I was carrying brick for Mr. Ferner.

Q. When was it?

A. About ten years ago.

Q. What kind of boat was it?

A. Propeller.

Q. How large a propeller?

A. I can't tell how large; about the size—somewhere near the ze of the Adriatic; might be a hundred feet long.

Q. Did she have a tow?

A. No, sir.

Q. Did you spring a hawser?

A. No, sir; no occasion to spring a hawser.

31 Q. Were you ever commandant of a steamer when there was occasion to spring a hawser?

A. No, sir.

Q. Ever pilot of a steamer when there was occasion to spring a awser?

A. No, sir.

Q. Did you ever direct the act of springing a hawser on a boat?

A. No, sir; I did not ever tell anybody to spring any hawser.

Q. You never became boatman of a character capable of doing a deed of that kind?

A. Yes, sir; I am capable of doing that.

Q. You consider yourself capable of judging when it is necessary?

A. Yes, sir.

Q. What governs you—what would govern you if that was the case in judging of the necessity for springing the hawser?

A. One thing would govern, because if the boat would not come

around by the tiller she would not turn good; I should take those hawsers up in the chock to keep the tow from the point.

Q. What else?

A. That is one reason.

Q. Any other reason why you would do it?

A. No; that is just the reason; the reason is to turn the boat so as to pull the tow.

Q. The reason is to turn the boat?

A. Yes, sir; to haul the tow around.

Q. So as to be ready to haul the tow around?

A. Yes, sir.

Q. When the tow gets far enough advanced, so as to have the boat in a position of readiness to change the direction of it?

A. I think I would change it before they would get in that position; I would have it on before.

Q. You would change the position of the tow before you got the hawser spring on the hawser?

A. If I could I would.

Q. Would you, when designing to use the spring on the hawser, change the position of the tow before you done it?

A. I would try to do it.

132 The COURT: I understand the witness says that he would spring the hawser whenever he found that the tow did not come around well by the motion of the wheel.

A. Yes, sir.

Q. When the steamboat does come around right there is no need of springing the hawser?

A. No, sir.

Q. Then if a steamboat is in the right and desired position there is no need of springing the hawser—and obeys the helm readily?

A. I don't know as there is if she goes in the right position.

Q. Do you know, and did you know when you drew this map, the position of the Niagara in going around those right angles that you drew there? (Exhibit A shown witness.)

A. I was not there to see it.

Q. If you knew it.

A. No, sir; I drew it just by my own judgment, as I have seen other boats go; did not see her; of course not.

Q. When is it most frequently, in your experience of navigating the Hudson river, necessary to spring the hawser with a tow—in ebb or flood tide?

A. Always on ebb tide.

Q. Name me a vessel that you have commanded or was a hand on that did it on ebb tide.

A. I can't remember.

Q. Was there ever a vessel you commanded or was on that did it on ebb tide?

A. Not that I commanded.

Objected to by plaintiff's counsel as assuming that he was a hand on board.

A. I was alongside of the tow—towed with the barge; I have seen them spring; I have not done it myself.

Q. Do you know any particular situation or condition of the tow that will especially render necessary the springing of the hawser? Name any particular condition of a tow being towed by a steam tow-boat that will render especially necessary the springing of the hawser.

A. I don't know what they sprung it for.

Q. Name any condition that you can imagine of a tow being towed by a steam tow-boat that will render the springing of the hawser especially necessary.

A. Yes, sir.

133 Q. Name the condition of the tow that renders it necessary.

A. You don't want to spring the hawser in the middle of the river.

Q. Name the condition of the tow that renders the springing of the hawser especially necessary.

A. If this tow was headed down I think it is necessary, in the night, that the hawser should be sprung.

Judge McLellan: I move to strike that out as not responsive.

The Court: That is not responsive.

Q. Name the condition of the tow, whether night or day time, that renders the springing of the hawser especially necessary.

A. I never took any particular notice.

Q. Can you do it?

A. Don't I say I can't? I did not see the condition of the tow.

Q. Can you name the condition of the steamer towing a string of boats that render- the springing of the hawser especially necessary?

A. I could not name the condition of that steamer.

Q. Name the condition of a steamer.

A. Or no other steamer.

Q. Can you answer that question?

A. I do answer it.

Q. Name the condition of a steamer.

A. I can't of a steamer; no steamer I know; only I have seen them spring the hawser; what condition they were in I don't take notice of, only I have seen them spring the hawsers.

Q. (Showing witness a map.) I want you to compare right here. That, I suppose, is the map of the river at West Point?

A. I don't understand that. Where is West Point?

Q. There is West Point; that is a map of it along there.

A. Yes, sir; that is pretty near the course.

Q. Where is the light on that map?

A. Is that West Point in there?

Q. No, sir.

A. Is this the river?

Q. Yes, sir.

A. Is this West Point there?

Q. You point out on this map where you think the light is.

A. I don't think it is down on here.

Q. You think the light is up where this line goes along?

A. Yes, sir; I don't understand that map; I just took it by my own judgment.

134 Q. Do you know where Magazine point is?

A. Yes, sir.

Q. Where is it on your map?

A. It is there.

Q. Will you find it on this map? Just take and compare these maps right there side by side and see how you have got that line running from this cove. You got it, if anything—the point is a little further north than the west end of this cove?

A. Yes, sir.

Q. You would run and require a boat to run almost directly east and west in going around down there?

A. No, sir.

Q. Which way does it go?

A. I want the boat to go a little northwest and southeast to come down here.

Q. When it is on this turn it goes to the east and west?

A. Yes, sir.

Q. You have drawn your boats directly east and west?

A. Yes, sir; goes around in that channel.

Q. And look at that. See if the centre of that channel on that course is not fully southeast.

A. No; not fully southeast; channel runs a little to northwest and southeast a little below.

Q. You don't turn southwest until after you get by West Point light-house?

A. You go right here for a ways.

Q. You do not go southwest until you get past by West Point light-house?

A. Yes, sir.

Q. You go southwest—go there—go around that point before you get by it?

A. I turn the boat and go right south.

Q. Do you go southwest until after you pass West Point light-house?

A. Yes, sir; I would steer from there to that light.

Q. Is that going southwest?

A. Yes, sir; that crosses from there, according the way the river runs.

Q. That goes southwest, that course?

A. It would go a little to the southward, then out to the west; I mean southeast.

Q. Is there any place that you go southwest until after you pass West Point light-house?

A. Then I go to the southward.

135 Q. Is there any place in going around that turn and east and west of the river, going down the river, any place you go southwest until after you get below West Point light-house?

The COURT: Let me put that question. Your first course in going down the river in making the turn is southeast?

A. Yes, sir.

The COURT: When you have got as far as you do get in a southeasterly direction have you gone past the light on West Point or not?

A. No, sir; I go a little southeast all the way down from the time I came around this point here. I then go a little southeast to get close to the light.

The COURT: You go first southeast?

A. Yes, sir; then northwest.

The COURT: You go first southeast?

A. Yes, sir.

The COURT: Then you turn and go southwest or westerly?

A. The way that is I generally go south.

The COURT: You turn to the southeast?

A. Yes, sir.

The COURT: Then after you have gone to the southeast you turn westerly and go southeast?

A. Yes, sir.

The COURT: When you turn after going southwesterly have you passed the light-house or not?

A. Yes, sir; I have passed the light-house.

Q. Then you don't go southwest at all in going down that river until after you pass the light-house?

A. Of course not.

Q. And after you have passed the light-house do you do any more than to keep along in the channel of the river in going down to New York with the steamboat?

A. Yes, sir; I would keep that steamboat closer to the westward to pull the tow in the middle of the river.

Q. But the tow is in the middle of the river?

A. She has to follow the steamboat.

Q. If the tow was in the middle of the river, as your witnesses have shown it to be, is there anything to require the steamboat to go on the west side?

A. They can't tell about the tail end of the tow after the whole is down; of course not.

136 Q. That is in proof; the whole tow was in the middle of the river straight behind the steamboat. Is there anything that requires a steamboat to go nearer the west shore than the east?

A. Yes, sir; after they get around the point.

Q. What is it then?

A. Then they want to pull to the westward.

Q. What, after they get around the point and the tow in the middle of the river, requires the steamboat to go to the west shore?

A. Because the tide set so fast over the east shore that it will set the tow on the rocks; they have to pull the tow to get it clear.

Q. After the tow or the steamboat gets around West Point does not the tide set to the west shore of the river?

A. No, sir.

Q. And how far below the West Point does that river — before the tide sets to the east?

A. From Boathouse point it sets to the westward.

Q. If Boathouse point on your map there (ind'g) or is there opposite (ind'g) then the tow sets to the westward?

A. No, sir; the tow sets here to the eastward. I say below Boathouse point or even around the point.

Q. And if Boathouse point you say is here, nearly opposite West Point light-house?

A. A little below.

Q. How far below?

A. I should think it was 200 yards below; right to the eastward below.

Q. If your tow is around West Point light-house in the middle of the river, the whole tow, is there any occasion for the steamboat to go to the west shore?

A. Not after it is around West Point light; after the tow is around West Point light; but when the boat is there the tow is the other side of it.

The COURT:

Q. Can you pass Boathouse point on an ebb tide? The drift is to the eastward.

A. Yes, sir.

The COURT:

Q. After the tow has passed Boathouse point, then there would be no occasion for the steamer to go westward to draw the tow off from the rocks?

A. No.

137 The COURT:

Q. And until the tow itself is past Boathouse point, up to that time the steamer, after having made the turn, must go westward to overcome the force of the current, which drifts them in toward Boathouse point?

A. Yes, sir; I am placing where the tow ought to be to pull her off—the way I drawed that (referring to diagram marked Exhibit A).

Q. What is the scale of that map (showing witness Exhibit A)?

A. I don't know anything about it. I just drew it up with a pencil. I was very sleepy when I done it.

Q. Is it a larger or smaller scale than this map that I showed you?

A. I think yours was the smallest.

Q. Have not you got Magazine point in a straight line, nearer on your large scaled map than it is on my small scaled one?

A. I don't know anything about it.

Q. When was this boat built?

A. I have forgotten.

Q. Was not it in 1853?

A. I should think she was built about 20 years before I had her. I think I had her about 10 years when she sank.

Q. That would make her about 30?

A. Yes, sir.

Q. Did I understand you to say you had owned her about 15 years?

A. 13 or 14 years.

The COURT:

Q. She had been built 20 years before that?

A. I think she had.

Q. The boat was about 33 years old when she was sunk?

A. Yes, sir.

Adjourned until Wednesday morning.

WEDNESDAY MORNING SESSION—9.30.

Cross-examination of Mr. SALISBURY continued by Mr. FROTHINGHAM:

Q. You say you are in the habit of being towed for many years by Schuyler's line prior to 1876?

A. I guess all of 10 years.

138 During the time I was towed by Schuyler's line I was generally in the habit of taking receipts.

Receipts produced by plaintiff and offered in evidence by the defendant.

Plaintiff objects to each and every one of said receipts on the ground that they are immaterial, improper, and irrelevant. Objection overruled. Plaintiff's counsel except.

One hereafter set forth in full; one also May 16, 1870, same nature; Oct. 12, 1870, same nature as the other one; Oct. 12, 1872, from Coxsackie to New York; precisely the same; Oct. 9, '72, Sept. 27, '72, and are all three precisely the same; Oct. 17, '73, July 24, '73, July 19, '73, Aug. 9, '73, Sep. 1, '73, Sep. 6, '73, Oct. 14, '73, Sep. 12, '73, Oct. 16, '73, May 5, '73, Aug. 18, '71, Aug. 2, '72, July 29, '72, April 10, '72, all with the same provisions and of same boat; June 21, '72, July 12, '72, May 11, '72, May 9, '70, Oct. 22, '72, Oct. 18, '72, Nov. 15, '72, Nov. 20, '72, Nov. 4, '72, May 16, '72, June 3, '72, May 28, '72, May 18, '72, and June 15, '72, all same boat; Oct. 12, '72, Oct. 9, '72, Sept. 27, '72, Oct. 2, '72, Oct. 29, '73, Oct. 23, '73, Apr. 23, '72, Aug. 15, '72, Aug. 7, '72, Aug. 21, '72, Aug. 10, '72, Nov. 8, '71, Oct. 10, '71, July 18, '76, Oct. 26, '71, June 22, '71, Apr. 29, '71, July 3, '71, July 8, '71, July 14, '71, Nov. 14, '71, June 28, '71, Sept. 21, '72, Sept. 18, '72, Oct. 7, '73, July 4, '72, July 6, '72, July 26, '72, Oct. 10, '71, Aug. 26, '71, July 19, '72, July 23, '72, Sept. 7, '71, Sept. 12, '72, Aug. 30, '72, Sept. 4, '72, Sept. 9, '72, July 19, 23, '72, Sept. 7, '71, all of the same boat and of Schuyler line.

Receipts received in evidence and read by the defendant, it being stipulated that they are all of the same character except as to price; that they were taken by Capt. Salisbury from the defendant, and it

being conceded that Capt. Salisbury testifies that there was no change in his contract except as to the price, and it being understood that the plaintiff objects to the evidence on the ground that they are immaterial and improper, and excepts to ruling admitting same.

139 One receipt read in evidence as follows:

"Schuyler Steam Tow-Boat Line. Steamers America, Niagara, Cayuga leave New York and Albany daily. Offices, 284 Broadway, Albany, and 15 South street, corner Broad street, New York. Notice: Towing must in all cases be paid in advance. Master and owners of the barge J. T. Lee to steamboat Niagara, Dr., for towing from Athens to New York, at the risk of the masters and owners of the boat or vessel towed, $25. Received payment for owners, Schuyler's Steam Tow-Boat Line."

The defendant then read in evidence each of said receipts, they being of the same character as the first one read.

Q. (Showing paper.) That your signature?
A. Looks like it.
Q. See it?
A. I would not swear it was. It looks very much like it.
Q. Can you see it without your glasses?
A. Yes, sir.
Q. Have you no doubt about it?
A. No; I have not much doubt about it.

DEFENDANT'S COUNSEL: We offer to read in evidence memorandum of an agreement between the captain and the Schuyler Steam Tow-Boat Line. We offer to read in evidence the agreement of arbitration, page 72. We offer first in evidence the agreement.

PLAINTIFF'S COUNSEL: We do not object to the reading of the agreement, which is on the first and second page of the document.

Memorandum and agreement read by Mr. Frothingham in evidence:

Memorandum of agreement between Schuyler Steam Tow-Boat Line, owner of the steamboat Niagara, and John Salisbury, owner of the barge John T. Lee.

Whereas said barge John T. Lee was taken in tow of the steamboat Niagara at New Baltimore on the 9th day of October, 1876, to be towed to New York, and on her passage down the river, when in the highlands, said barge, with other boats, broke loose from
140 the tow, and said barge drifted onto rocks and received injuries which afterward caused her to sink and become a total loss; and

Whereas said Salisbury claims that said tow-boat line is responsible for the value of said barge by reason of the casualty aforesaid, and pending negotiations for a settlement a question has arisen as to her value:

Now, therefore, in consideration of the premises, said Schuyler's Steam Tow-Boat Line and said John Salisbury do hereby promise

and agree to and with each other to submit and do hereby submit all questions between them touching the value of said barge to the arbitrament and determination of Thomas A. Lawler, of Jersey City, N. J., and William Hull, of Hudson, N. Y., whose decision and award shall be final, binding, and conclusive on us as to said value at the time of such casualty, and in case of disagreement between the said arbitrators they may choose an umpire, whose award shall be final and conclusive.

The arbitration to proceed on testimony of such witnesses or affidavits as shall be agreed to or shall be produced on either side before the arbitrators at the office of Schuyler's line, No. 15 South street, in the city of New York, from time to time, within thirty days from the date thereof.

The testimony and other proofs is to be taken and produced with all reasonable dispatch.

In witness whereof the parties hereto have hereunto set their hands this 22d day of November, 1876.

G. L. GARLICK,
Agent Schuyler's Steam Tow-Boat Line.
JOHN SALISBURY.

Defendants offer in evidence, subject to objection, a chattel mortgage made by the plaintiff to Robert Ferrier and Thomas E. Ferrier to secure the payment of the sum of $2,000, dated September 1st, 1870, reciting that the mortgagees had loaned and advanced unto John Salisbury the sum of $2,000 upon the body, tackle, and appurtenances of the barge or vessel called the John T. Lee, of the
141 burden of 105.49 tons or thereabouts, the said Salisbury being the owner of said barge. The condition of the mortgage is that the said John Salisbury shall pay the mortgagees $2,000, with interest thereon from the date thereof, payable $40 per trip and interest quarterly. This mortgage contains the following provision: "And in consideration of and as security for said loan the said vessel is by these presents assigned, pledged, mortgaged, set over, and conveyed to the said Robert Ferrier and Thomas E. Ferrier, their heirs and assigns, the certificate of enrollment of which said vessel is as follows," viz: Here follows the enrollment, which, among other things, recites that said Salisbury is master of said barge; that she was built in 1853; that her length is 94 feet, her breadth $24\frac{6}{10}$ feet, her depth 6 feet, and that she measures $105\frac{49}{100}$ tons, and that said Salisbury had agreed to her description and measurement.

Defendants also offer in evidence a chattel mortgage made by John Salisbury to Thomas E. Ferrier, bearing date 23d August, 1875, conditioned to pay $500, with interest in three months from date, said mortgage containing in substance the same provisions described in other mortgages offered in evidence and having attached to it a note for $500 payable in three months from August 23, 1875.

It is conceded by counsel that at the time of the loss of the Lee default had been made in the payment of these mortgages, and there was due to the mortgagees the sum of $1,450, with interest.

Defendants also offer in evidence another chattel mortgage made

by the plaintiff to Mathers Van Loan and Peter Magee, to secure the payment of the sum of $800, dated October 7th, 1875, conditioned that the mortgagor shall pay to the mortgagees $414.46, with interest, in one year from the date of said mortgage, and in other respects it contained the same provisions as the mortgages already offered in evidence.

PLAINTIFF'S COUNSEL: We object to those mortgages and notes as immaterial, and the agreement is, also—all these papers.

142 DEFENDANT'S COUNSEL: The object is to prove the size of this vessel; the object is also to prove that the legal title to this vessel was in these mortgagees; we also offer it with the expectation of proving the notice served upon this defendant by these mortgagees, one of which is contained at pages 70 and 71 of the printed case.

The COURT: I don't think I will exclude them; I think I will leave them in evidence.

Exception by plaintiff's counsel.

Said mortgages were received and read in evidence by the defendant, subject to plaintiff's objection as to their materiality.

One of said mortgages was as follows:

Know all men by these presents that I, John Salisbury, of the town of Athens, in the county of Greene and State of New York, am held and firmly bound unto Matthias Van Loan and Peter Magee, of the same place, in the just and full sum of eight hundred dollars, lawful money of the United States of America, to be paid to the said Van Loan and Magee, their heirs, executors, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Dated at Athens this seventh day of October, in the year one thousand eight hundred and seventy-five.

Whereas the said Matthias Van Loan and Peter Magee this day lent and advanced unto the said John Salisbury the sum of four hundred and fourteen dollars and forty-six cents on the body, tackle, and appurtenances of the barge or vessel called the John T. Lee, of the burden of one hundred and five and forty-nine-hundredths tons or thereabouts, the said John Salisbury being the owner of said vessel:

Now, the condition of this obligation is such that if the said John Salisbury shall pay or cause to be paid to the said Van Loan and Magee the sum of four hundred and fourteen dollars and forty-six cents (the amount loaned) and interest thereon in one year

143 from the date thereof, then this obligation to be void; otherwise to remain in full force and virtue; and in consideration of and as security for said loan as aforesaid the said vessel is by these presents assigned, pledged, mortgaged, set over, and conveyed to the said Van Loan and Magee, their heirs and assigns, the certificate of the enrollment of which vessel is as follows, viz:

Enrollment in conformity to an act of the Congress of the United States of America entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries and for regulating the same."

John Salisbary, of Athens, having taken or subscribed the oath required by the said acts, and having sworn that he is a citizen of the United States, sole owner of the ship or vessel called the John T. Lee, of West Troy, whereof he is at present master, and is a citizen of the United States, and that the said ship or vessel was built at New Baltimore, New York, in the year 1853, as appears by enrollment No. 75, issued at this port August 8, 1867, now surrendered property changed in port, and said enrollment having certified that the said ship or vessel has one deck and one mast, and that her length is 94 feet, her breadth $24\frac{6}{10}$ feet, her depth 6 feet, and that she measures $105\frac{44}{100}$ tons; that she is a barge and has a — head; and the said John Salisbury having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said acts, the said barge has been duly enrolled at the port of Troy.

Given under my hand and seal, at the port of Troy, in the district of New York, this first day of September, in the year one thousand eight hundred and seventy.

[L. S.] ——— ———,
Deputy Collector.

It being mutually understood and agreed that in case the amount of said loan and interest or any part thereof, according to the terms of these presents, shall remain due and unpaid to said Van
144 Loan and Magee after the expiration of one year from the date hereof the said Van Loan and Magee may take possession of said vessel and appurtenances and sell the same at public auction in order to satisfy the amount then due without any proceedings in court or otherwise for the purpose of authorizing such sale, and thereupon may execute and deliver a sufficient bill of sale to transfer completely to any purchaser or purchasers all title and property in and to the said vessel and appurtenances to the said purchaser as owner thereof now belonging.

The said Van Loan and Magee thereupon to account to the said John Salisbury for any surplus of such sale as aforesaid; the said John Salisbury, his executors, administrators, or assigns, shall, whenever thereto requested, make, execute, and deliver to such purchaser or purchasers another bill of sale of said vessel, in which the enrollment shall be recited as above, for the transferring completely to said purchaser or purchasers all the right, interest, or claim of said John Salisbury, his executors, administrators, or assigns, as owner of said vessel.

And in default of the prompt execution and delivery of such other bill of sale to such purchaser or purchasers by the said John Salisbury when thereto requested the said Van Loan and Magee are hereby constituted and appointed the legal attorneys of the said John Salisbury for the purpose of making, executing, and de-

The COURT: If that be in it should go out.
Judge MCCLELLAN: That is all I want.
The COURT: That should go out beyond doubt.

Redirect examination.

By Mr. ANDREWS:

Q. Which way the tide runs at West Point when it is ebb tide—whether it is down or up the river.
A. The tide sets right down.
Q. Whether it is running up or down the river.
A. Running down.
Q. A flood tide that runs which way?
A. Runs up.
Q. I want to know whether you have any documents or any information by which you are able to correct the age of the barge at the time she was sunk?
A. She was about 24 years old.
Q. How do you ascertain that?
A. I have the enrolment and the age of the barge in my pocket (showing same); also the insurance.
148 Q. Are you acquainted with the price of these brick at Castleton at the time of this accident—the market value?

The COURT: Will you dispute the value of the brick?
Judge MCCLELLAN: We make no point upon the value.

Q. Whether they were destined to New York city.
A. Yes, sir.
Q. And what was the market value at Castleton at that time?
A. They were worth about four dollars, I should think.
Q. And what was the market value at New York city?
A. They were worth, I think, about five dollars, and five dollars and fifty cents. Twelve shilling freight we generally got per thousand.

Recross-examination.

By Mr. FROTHINGHAM:

Q. You say you are enabled to determine the age of this boat from the enrolment which was produced here?
A. When she was built; what year she was built in is there.
The COURT: When was she built?
Mr. FROTHINGHAM: Built in 1853.
The COURT: Where was she built?
A. At New Baltimore, Greene county.
Q. When did you buy her?
A. I bought her about 30 years ago.
Q. What did you pay for her?
A. I think I paid when we bought her something over $1,500; was a trade for one-half of her; I traded a schooner. Mr. Ferrier also bought the other half at that time.
Q. You and Robert Ferrier bought her from Oswald?

A. Yes, sir.
Q. What was the consideration for that vessel?
A. Somewhere about $3,000.
Q. (Showing witness enrolment.) Look at that and state the consideration. Was that consideration expressly stated in the bill of sale—that $2,000 correctly stated?
A. $2,000 in that was only one-half.
149 Q. Is this the enrolment in which you are enabled to refresh your recollection as to her age?
A. Yes, sir; it states when she was built.

DEFENDANT'S COUNSEL: We offer to read it in evidence: Received enrolment 31st July, 1867, Defendant's Exhibit No. 2, C. B. P. (as set forth in the chattel mortgage heretofore recited).

JAMES SMITH recalled for plaintiff.

Examined by Mr. ANDREWS:

Q. Did you say to Charles Nelson about the time that that part of the barge which broke loose was attached?

Objected to by defendant's counsel.

Q. I ask him for the purpose of contradicting Charles Nelson in part and in part for the purpose of showing what the truth was in regard to it, whether you told him that you could go to New York after your boat had struck.

The COURT: I can give you the exact words: "I saw a man working there. A man said she was leaking bad. He said bad, but he would like to go on to New York; said if he could get canvas on boat he could go on to New York. I said al- right; did not know the captain on board. I supposed he was talking to the captain."

Q. Did you say to him if you got the canvas on the boat you could go on to New York?

Objected to by defendant's counsel. There is no proof. Mr. Smith swore directly that he never saw the mate of the boat there, and he, Nelson, is the witness of the plaintiff. One object is to contradict something that their own witness, Nelson, never said; that he never had a word to say to this man.

The COURT: I think it is competent.

Exception by defence. General objection is it is improper.

A. I did not see the mate at all.
The COURT: Did you tell him that?
A. I did not see him to tell him that.
150 Q. Answer the question whether you said that.
A. No, sir; I did not.
The COURT: You might have said something to that man, although you did not see him.
A. I did not say it.

Cross-examination.

By Judge McLELLAN:

Q. You did not see him that night?

A. No, sir.

Q. Until you were taken on board of the Niagara?

A. When he came back with the small boat.

Q. Had you seen him at all on the tow until you were taken on the Niagara?

A. No, sir; not that I know of.

Q. What did you say to anybody making any inquiry? Did you say anything to anybody that made an inquiry about the condition of your boat there that night?

A. Nothing more than what this man had been helping us was talking.

Q. You had no talk except with the man that had been helping you?

A. Nothing more than as I asked for the help, as I said before.

Redirect examination.

By Mr. CADY:

Q. When you were on the stand before you said that you took a pillow and undertook to press it down into the hole in the bottom of the boat. Did you try to fasten that pillow down with anything else?

A. After I put the pillow in there the canvas was on the hole at that time.

Q. Did you fasten it with anything else?

A. I did not have time.

Q. You did not?

A. No, sir.

Q. Why did not you?

A. Because the time I wanted to look for something else or a board to look over this pillow to fasten with a piece of canvas, to put over the hole, as I thought would have done; to nail a piece of board over the hole, put a piece of canvas on it, if I had time, from the outside; that would probably keep the boat al- right.

151 Q. Why did not you have time?

A. The canvas worked off while I had been trying to find this board, and the water commenced to come in.

Q. When you undertook to put that pillow in was anybody with you in the hold of the boat?

A. This man that was on the light canal-boat.

Q. Was he with you?

A. I think he was when I put the pillow in.

Q. That you done in the hold?

A. Yes, sir.

Q. What was his position on that other canal-boat?

A. Captain, I think.

Q. You and he talked the matter over, of stopping this hole?

A. Yes, sir.
Q. Where was Brousseau while you and he were down there?
A. He was at the pump.

Recross-examination.

By Mr. FROTHINGHAM:

Q. Do you recollect the name of that boat?
A. I don't know what her name is. She was a light canal-boat.
Q. What was your impression about that?
A. I could not tell you.
Q. Was it Mr. Ryan?
A. No, sir; I did not know the man; did not hear the name.
Q. You don't know whether it was he or not?
A. No, sir.
Q. When did you put this pillow in the hole?
A. After they had cut the ceiling away.
Q. How long after she struck?
A. That I could not say exactly. I could not give no certain time.
Q. Was it before the tow was put together again or after?
A. I think the tow was together; I think it was.
Q. Did you put it in the hole before or after the canvas had worked off?
A. Before the canvas had worked off I think I put it there.
Q. How deep was the water in the boat when you put it there?
A. The water was more aft on account of the boat being loaded.
152 Q. How much water in the boat where the hole was?
A. You could see the plank; all on the bottom of the hold.
Q. You hadn't time to do that; you needed some assistance?
A. No, sir; I did not have time.

SAMUEL BROUSSEAU recalled for plaintiff.

Examined by Mr. CADY:

Q. Did you hear the witness Charles Nelson examined?
A. Part of it; yes.
Q. Did you on the occasion—this night when the accident happened to the—at any time say to Charles Nelson in words or in substance that if you could get the canvas over the boat you could go on to New York or that you wanted to go on to New York?
A. No, sir.

Same objection by defendant's counsel as to the former question put to the last witness.
Overruled. Exception.

CHARLES NELSON recalled for plaintiff.

Examined by Mr. CADY:

Q. You said yesterday that you went back upon the canal-boat alongside the Lee; you remember that?

A. Yes, sir.

Q. How many times that night did you go back to this canal-boat alongside the Lee?

A. I did not go back but once.

Q. And the occasion which you described yesterday, when you stood on that canal-boat for 10 or 15 minutes, was the only occasion on which you were on that canal-boat that night?

A. Yes, sir.

Q. When you went back there you had made the rest of the tow fast together?

A. No, sir.

Q. Then was the steamboat pulling the tow around before it was fastened together?

A. Yes, sir.

Q. And the steamboat controlled the tow?

A. Because we had one hawser to the detached part.

153 Q. You did not make the broken portions together until after you had been back on that canal-boat?

A. Yes, sir.

Q. You had one hawser to this detached part and the hawsers out to the part which remained fast to the boat?

A. Yes, sir.

Cross-examination.

By Mr. FROTHINGHAM:

Q. Do you recollect this boat? You were only, say, a little further than the Lee; was she longer?

A. No; not of any account; a foot or so.

Q. You were on the boat where you could communicate with these men on the Lee?

A. Yes, sir.

Q. You talked with the men who appeared to be in charge of the boat?

A. Yes, sir.

Q. But whom you supposed to be in charge of the boat?

A. Yes, sir; captain.

Q. You supposed you were talking with the captain of that boat?

A. Yes, sir.

Q. He was the man that was in charge of the boat?

Objected to as leading.

The COURT: I think it is a reopening of the subject.

Redirect examination.

By Mr. ANDREWS:

Q. About how many miles an hour was the speed of this vessel Niagara with this whole tow attached?

A. I could not exactly tell.

Q. Tell us near as you can.

A. At that time we had an ebb tide; we would go faster than on flood. I should judge in the neighborhood of two miles an hour, probably, or thereabouts; I could not tell exactly.

Recross-examination.

By Judge MCCLELLAN:

Q. When you were sworn before did I understand you to say that Boathouse point was east, opposite West Point, or south or opposite West Point?

154 A. A little southeasterly direction; in the neighborhood of south or southeast, probably, or thereabouts.

Q. How much further south than West Point, in your judgment, is Boathouse point? Is it compared with the width of the river; is it as much further south from West Point as the river is wide?

A. Not quite as much as that.

Q. How far is Boathouse point above Garrison's?

A. In the neighborhood of a half mile or not quite a half mile.

Redirect examination.

By Mr. ANDREWS:

Q. Boathouse point—that a long strip of highland?

A. Yes, sir.

Q. You mean this point which you say is a little further south of West Point is wherever Boathouse point begins?

A. Yes, sir; after they get around those rocks Garrison's commences.

Recross-examination.

By Judge MCCLELLAN:

Q. At that place, Boathouse point, the tide at ebb tide always set to the west?

A. At a certain distance from shore; yes, sir.

Redirect examination.

By Mr. ANDREWS:

Q. I understood you to say on the examination yesterday that the tide there just below West Point sets right over to these rocks at Boathouse point?

A. It does.

Q. So that a vessel that had nothing to keep it steady would go on the rocks?

A. Not a boat alone.

Q. A barge all alone would go right on the rocks?

A. Not when she was entirely alone, because she goes at a certain distance, the action of the tide would carry her off again; but those tow was so wide, the pressure of the tide was setting to the eastward, set the body of them close so they had not action to set it back.

155 Q. You want to say now that these detached vessels could not have gone on the rocks at Boathouse point because — they got near there they would have been rushed right off to the west?

A. Yes, sir.

Q. Did not you state that you thought that this boat got on the rocks at Boathouse point?

A. I don't know where else she got on.

Mr. CADY: I read the testimony of William Hull, page 73, printed case.

Mr. Cady reads both the direct and cross examination:

Q. Were you one of the arbitrators selected by John Salisbury and Schuyler's Steam Tow-Boat Line with reference to the casuality that happened to the John T. Lee?

A. I was.

Q. And did you and the other arbitrator meet together and take testimony with reference to the matters submitted to you on that arbitration?

A. We did.

Q. What was the result, so far as the agreement was concerned?

A. There was a paper drawn. We didn't agree.

Q. Could you make any report between you?

A. No, sir; the arbitration involved the choice of a third man.

Q. Then did you make an effort to agree upon a third man?

A. And failed.

Q. Did you notify Mr. Salisbury that you had failed to agree?

A. I did.

Q. Was the notification to Salisbury in writing or verbal?

A. Verbal.

Q. And that was done before this suit was brought?

A. Yes, sir; there was a failure to agree upon our part before the suit was brought.

Cross-examination:

Q. Do you know whether the Schuyler line was ever notified of your action?

A. I do not.

Mr. Cady reads the testimony from printed case, both direct and cross examination, page 36, of Hezekiah Van Loan:

156 HEZEKIAH VAN LOAN sworn for plaintiff:

Q. Live in Athens?

A. Yes, sir.

Q. You know the barge John T. Lee?
A. I have known her; yes, sir.
Q. How long?
A. For the last twelve or fourteen years.
Q. Are you acquainted with the value of barges and boats?
A. I have had some little to do with the boats.
Q. You are acquainted with their value?
A. If I was going to buy a boat I should make up my mind what I wanted to pay for it.
Q. Have you bought and sold?
A. Yes, sir.
Q. Have you ever been engaged in the boat business?
A. Yes, sir.
Q. For how many years?
A. Thirty-odd years. Ever since 1846.
Q. What would you regard the value of the barge John T. Lee in the fall of 1876, before she was sunk?
A. I should think she ought to be worth in the neighborhood of $3,000.
Q. That exclude or include her furniture or cargo?
A. Generally in; when we buy boats we buy all that belongs to her.
Q. The anchor and sail?
A. All the apparel; all the lines anchors, etc.; everything belonging to the boat.

Cross-examination:

Q. Do you know the age of this barge?
A. I do not.
Q. Did you know her dimensions?
A. Not exactly; never measured it.
Q. Did you know how many tons she will carry?
A. I don't know exactly; I have an idea.
Q. You don't know whether she was sound at the time of this accident?
A. I don't know whether——
Q. You don't know anything about her condition?
A. Nothing more than what I have seen by my passing over her decks at different times.
Q. Is not the value of the barge told by her age, size?
A. Certainly.
157 Q. Do you know of any sale of barges at that time?
A. No, sir.
Q. And don't you know what she would sell for in the market?
A. No, sir.

Redirect examination:

Q. What effect would salting and pickling have upon her?
A. It has always been said to have a good effect.
Q. You don't know her ton-age; what would she carry?

A. Somewhere about 230 to 240 tons; somewhere in that neighborhood.
Q. Have you seen this barge hauled out?
A. Yes, sir.
Q. On a dry-dock?
A. Yes, sir.
Q. Have you seen her decks stripped?
A. Yes, sir; some part of it.
Q. What would be the draft of the Lee with 250 tons on board?
A. I should think about seven feet. That is more than I think she would carry. I think she would draw seven feet of water with her load.
Q. What would you judge her length to have been?
A. Somewhere about eighty-five or ninety feet.
Q. And her beam?
A. Twenty-three or twenty-four feet; thereabouts.

It is understood between counsel that the plaintiff reads the evidence of four witnesses on value from printed case.

George Van Loan's evidence read by Mr. Cady, direct examination and cross-examination, page 38, printed case, as follows:

GEORGE VAN LOAN sworn for plaintiff:

Q. Business?
A. Boatman.
Q. How long have you been engaged in that business?
A. About ten years.
Q. Bought and sold boats?
A. Yes, sir.
Q. Acquainted with their value?
A. Well, a little; not much.
158 Q. Do you regard yourself as acquainted with the value of boats; have confidence in your own opinion?
A. Yes, sir.
Q. Were you acquainted with this barge John T. Lee?
A. Yes; somewhat.
Q. How long had you been acquainted with her?
A. Four or five years.
Q. Been on board of her?
A. Yes, sir.
Q. Frequently?
A. Yes, sir; quite a good deal.
Q. Examined her?
A. No, sir.
Q. You have formed an opinion?
A. Yes, sir.
Q. What was she worth in October, 1876?
A. I don't know.
Q. In your opinion.
A. I had offered three thousand dollars for her. This was in 1875.
Q. You had offered it?

A. Yes, sir.
Q. Did you regard her worth that at that time?
A. Yes, sir.
Q. Would that include the furniture, or what would it include in the way of furniture?
A. It included lines, anchors, chains, bedding, etc.

Cross-examination:

Q. What was her depth?
A. I should judge about six feet in her hold.
Q. How much would she carry?
A. I think she carried brick—110,000 brick.
Q. How many tons?
A. Two hundred and twenty-five or two hundred and thirty tons; somewhere along there.
Q. Would she carry more?
A. I don't know. I think that would be load enough.
Q. More than that would be an overload?
A. Yes, sir; I think so.

Redirect examination:

Q. If she had been in the habit of carrying 125 to 30 thousand for years would you have the same opinion?

Objected to.

The COURT: Perhaps that is a little hypothetical.

159 Q. Was she a flush decker or a high gunwale?
A. She was what we call a log gunwale; a gunwale about a foot high.
Q. Would that increase her carrying capacity?
A. Yes, sir.
Q. How much?
A. I can't tell.

Mr. *Mr.* Cady reads the evidence of Enos R. Edmonds, page 66, printed case, as follows:

ENOS R. EDMONDS sworn for plaintiff:

Q. You reside in Athens?
A. Yes, sir.
Q. You are a ship-builder by trade?
A. Yes, sir.
Q. Acquainted with the barge John T. Lee?
A. I know it.
Q. Acquainted with the value of vessels in 1876?
A. Yes, sir.
Q. What was she worth then?
A. I considered her worth $3,000.

Cross-examination:

Q. Did you know the condition she was in?

A. I had been aboard of her quite frequently.
Q. That year?
A. I could not say exactly as to the year; had been aboard of her every year for the last seven or eight years; ever since she belonged in Athens, anyway.

Mr. Cady reads the evidence of William Brooks, page 71, printed case, as follows:

WILLIAM BROOKS sworn for plaintiff:

A. Business, boatmen; acquainted with the value of boats a little.
Q. Bought and sold?
A. Yes, sir.
Q. Did you know the John T. Lee in 1876 and prior?
A. I did.
Q. What was she worth?
A. In that year we offered him $2,800; in the spring.
Q. What was she worth?
A. I considered her worth $3,000.

160 No cross-examination.
Plaintiff rests.

Mr. FROTHINGHAM, for defense: I have a few legal propositions to submit to the court, and I move for a nonsuit.

I ask for a nonsuit upon the grounds:

First. There is no proof of negligence of the defendant; it was not proof of negligence in making up the tow that the rope appeared old at the time of its breaking; any rope might appear old after having been used and chafed, and especially as the evidence upon that subject was that at the time of making up the tow defendant's agent examined the lines and found them sufficient.

Second. That the plaintiff was guilty of contributory negligence.

Third. On the ground that the plaintiff's barge had not on board her usual small boat, which could have been used in an emergency like this.

Fourth. That it affirmatively appears that the plaintiff's boat was not sufficiently manned for an emergency like this, the proof being that a crew for a boat of this character should be three men and a captain.

Fifth. That the absence of the requisite lights and the displaying of the lights indicating a steam tow-boat while in the act of towing is an act of negligence and contributed to this accident.

Sixth. That it appears that there was no watch on the deck of this vessel at the time, and that it was an act contributing to this accident.

Seventh. That the master had deserted his post, and that that was an act of contributory negligence; by his own act had deprived the barge of a small boat and the only boat that they had for use in such an emergency.

Eighth. That it affirmatively appears that the men that were left

on this boat were incompetent for the emergency, and therefore contributed to this accident, and they have affirmatively proved that fact.

Ninth. That it affirmatively appears that the title, legal title, to this boat was not in the plaintiff by reason of the
161 chattle mortgages and the notices served upon the defendant by the mortgagees.

Tenth. Generally upon the ground that the proof is insufficient to show a cause of action, show negligence on the part of the defendant, and it affirmatively proves negligence upon the part of the plaintiff.

The COURT: I assume that all these questions which you have now raised and partly discussed were raised upon the former trials of this cause before Judge Osborn. I assume also, because both cases went to the jury, that he must have overruled the motion for a nonsuit made upon these grounds. I do not think in trying this cause for the third time that I ought to differ from him in my conclusions and take the case away from the jury. The case has been at the general term also. It seems that the general term granted a new trial, not upon any of the grounds upon which you have now mentioned, but upon the single ground that it was shown upon the trial that the rope which broke, causing the breaking up of the tow, was the plaintiff's rope. If the general term had supposed the other propositions were maintainable, I think I ought to assume for the purposes of this trial they would have done so; and not doing so ought to control my action.

However, I confess that one or two of your propositions are somewhat staggering; more especially that part or that provision of United States law in regard to a light. I am rather inclined to think I will not nonsuit the case. Perhaps I ought to say a word or two more, giving my general idea what may be the matters in controversy in the case. I do say, of course, subject to my right to change my conclusions if I find I am wrong, or to take any other view of the case, or further view, which I think I ought to take when the evidence is completed.

I assume for the present, at least, that it is reasonably clear that this boat sank by reason of her coming in collision with the rocks.

Now suppose the plaintiff had stopped, proving just that one
162 fact, would the court have been justified in nonsuiting the plaintiff? In favor of the plaintiff's right to recover there would have been these arguments. If the boat struck upon the rocks, whose fault was it? If there were no breaking of a tow-line and she struck upon the rocks, she could only have struck upon those rocks because she was hauled there by the defendant, and that would raise the presumption that he was in fault, and as the absence of the experienced men on board of the barge could not possibly have prevented the result or contributed to the accident, I think I should be bound to submit the cause to the jury, whether that did not furnish proof of negligence on the part of the plaintiff or not. If you assume that it went into the rocks in consequence of the defendant's rope breaking, whose fault was that? The rope

which hauls the vessels must be deemed to be between the boat towed and the steamer, and the rope of the defendant, I concede, if any rope on board of the plaintiff's boat had broken, it would present a different question. Whether the owners of these various canal-boats were bound to furnish the ropes which connect them would be a question as between each boat and the steamer; that if a steamer undertakes to pull or tow a vessel which is fastened to the rear of other boats, I think it is the duty of the owner of the steamboat to see to it that the various ropes which connect the preceding vessels to the steamer are sufficient for the purposes intended; and the breaking of one rope in the absence of proof tending to show the cause would be presumptive proof of negligence on the part of the owner of the steamboat. It would be for him to explain.

Now as to the alleged contributory negligence on the part of the plaintiff; can the court assume as matter of law that the absence of the master caused the negligence or contributed to it? I admit it is for the plaintiff to show a freedom from contributory negligence, but if this boat was rushed upon the rocks by the steamer, without the breaking of the tow-line, the presence of the master ought to have stopped that result, because that boat was powerless in the
163 tow; she was drawn exactly where the momentum of the steamer propelled her; if it was caused by the breaking up of the tow, by an imperfect line of the defendant, how could I assume as matter of law that the negligence of the plaintiff in the absence of the master, and leaving an insufficient and inexperienced crew on board, contributed to that result, and that if the captain had been on board the drifting of this vessel against the rocks could in any way have been prevented, would not that also be a question of fact for the jury? I do not know that these rules are necessarily sound.

There is something to be said on the other side, I conceive, because it may be said in your behalf that if a proper light had been displayed upon this rear tow, which was visible to the eye of the pilot of the steamer, that you would not have permitted, if the line was unbroken, the tow to drift so far over to the east shore where she struck; or if the accident was caused by the breaking of a line, with the exhibition of a proper light, would have enabled him to discover sooner than he did discover the breaking of the tow, and had enabled him to have repaired the damage. I do not know but what that may be regarded a pretty serious difficulty hereafter in the case by way of recovery for the plaintiff; but still inasmuch as the course of the other trials has been to submit these questions as questions of fact to the jury, I think I shall be bound to do so now. It is not sufficient, of course, to show that the plaintiff was guilty of some act, which was of itself negligence, the negligent act must be one that contributes to the result. Under the former trials of this case, and upon the former trials of this case, whether or not these different acts of negligence contributed to the result were left as questions of fact for the jury to pass upon. If that had been wrong, I assume the general term would have granted a new trial for that reason; not doing so is rather evidence to my mind they did not

think it was. Of course they are grave questions. I think it is safer to try this case upon the theory which it was tried before, to send all the questions to the jury.

164 Judge McCLELLAN: I then understand the court to decide that it is not incumbent upon plaintiff to prove that any act or omission of the plaintiff did not contribute to the sinking of that boat, even though unless that act was performed or omitted to be done prior to the striking of the rock?

The COURT: I have not held that. I have held on the contrary. I think that is the law, that, to recover, the plaintiff must show two things: First, that the defendant was negligent; second, he must show that he was guilty of no negligence which contributed to the result. Upon that point I only hold that conceding that there is some negligence on the part of the plaintiff shown, that I would not be justified in holding as matter of law, under this condition of proof, that such negligence contributed to the accident. That is a question of fact for the jury. You say that they had not on this boat a proper light. I so concede that. You further say that the boat was insufficiently manned; I so concede that. Now, can I hold as matter of law that the absence of the lights and the absence of the captain was such negligence as contributed to the result? I have no difficulty in holding that the absence of the lights and the absence of the captain may be regarded as negligence, but I have a difficulty in deciding as matter of law that those acts of carelessness contributed to the result. It is for the jury to say how this accident was caused. It is for them to say if the absence of the light and absence of the captain from the plaintiff's boat contributed to the result.

Exception by defendant's counsel.

Judge McCLELLAN: Does the court regard the striking of the rock or the sinking of the boat?

The COURT: More especially when I made the remarks to which your question alludes, I had reference to the striking upon the rocks. The cause of action in the cause, of course, is the sinking of the boat. The cause of the sinking was the first striking of the boat upon the rock. If after that time there was any negligence on the

165 part of the defendants, that is negligence in regard to the prevention of the full effects of the injury rather than as to the cause of the injury itself.

The court of appeals, as I understand them, have held this in substance, that where a person is put in peril by the carelessness of another that a jury must not hold the person who is thus put in peril to strict accountability in regard to his taking care to avoid the consequence of the fault of the other. It is not for the person who has placed another in peril to say, "You have not acted with the best judgment; you have not acted as a man in his cool moments and not imperiled to act." It is for the jury to say, under the circumstances of the peril in which he was placed by the act of the defendant, taking that into account, he was acting with unskillfulness or want of judgment. Perhaps that is applicable to this

case. If the jury reach the conclusion that this accident was the fault of the defendant, and the plaintiff was free from contributory negligence, then whether or not there was a reasonable degree of care, such as you would have expected to be exercised under similar circumstances, is the only remaining question of fact for the jury upon that point.

Judge McClellan: I fail to get at the point. What we claim was I understand your honor to overrule. We claim here that there is no proof on the part of the plaintiff to show that they were free from contributory negligence, not by the omission of any act which they, as navigators in the care of that barge after she had struck, might have prevented the sinking of the vessel and the loss of the property upon her. We claim that there is proof affirmative that they were guilty of such negligence. I understand your honor claims that there is not sufficient proof here that devolves upon the court to decide that question here as a matter of law.

The Court: I hold in regard to that, that the conclusion which is to be drawn from the evidence may vary, and that I would not be justified in drawing the conclusion as matter of law that
166 the negligence of the plaintiff either contributed to the original accident or that the want of care upon the part of the plaintiff after collision with the rocks could have prevented this sinking of the boat. Those two must both involve questions of fact for the jury. I say I have grave doubt as an original question of fact; but under the course of the trial I feel myself compelled to submit those questions to the jury.

Mr. Frothingham: We never heard any question until now that this boat was drawn upon the rocks by the steamer. There is no proof in this case.

The Court: I know there is not. I was only putting a supposed case. I said, suppose that the plaintiff had rested his cause. You moved for a nonsuit on the ground that the evidence was insufficient, also taking the further ground that the plaintiff was bound to exhaust himself before he rested the cause. I said I assumed, in the first place, the cause of this boat sinking was coming in collision of those rocks—drifting on those rocks. I would assume that the cause was the striking of the boat upon the rocks. She either was drawn there before the tow broke or she drifted there after the tow was broke. I said, if by any possibility it could be said that she was drawn there before the tow broke the fact that she was drawn there by the steamboat controlled by the defendant called upon him to explain the act. *Prima facie* it was negligence. I said, if they found, as matter of fact, that the cause of the accident was the breaking of the tow-line, and that she drifted there, with the fact that the tow-line broke, must throw upon him the burthen to explain that he was not in fault in regard to the line; but the difficulty was with me, which was the contributory negligence of the plaintiff. I further held, in regard to the negligence of the plaintiff, absence of the plaintiff and the absence of light. While I concede that this would be negligence under certain circumstances, I would

be compelled to nonsuit a case under certain causes, yet it
167 would not do for me to say, as matter of law, that the absence of the proper light, and with the absence of the captain, was such negligence on the part of plaintiff as contributed to the result. I had some doubt about it as an original question, but the course of the previous trial and the decision of the general term make it my duty, I think, to take that course now.

Mr. FROTHINGHAM: Exceptions to the propositions and also to the proposition that the defendant is responsible for these ropes that were contributed by the boats; and one other point I should like (interrupted)——

The COURT: I do not mean to say that the defendant is responsible for all these ropes. I expressly say if it was a rope which the plaintiff was bound to furnish broke, then the defendant would not be responsible. I also said if it was a rope further on in the tow which broke, whatever may be the questions as between the owners of that boat whose rope broke and the steamboat, yet that, so far as the plaintiff was concerned, he was placed in the rear of this tow by the defendant; that as to that plaintiff the defendant is deemed to be negligence if the tow-lines were insufficient to draw that boat with safety.

Exception by defendant's counsel.

Mr. FROTHINGHAM: One other ground to the jurisdiction of the court.

The COURT: Yes.

Mr. FROTHINGHAM: On the ground that it is within the admiralty jurisdiction of courts of the United States.

Adjourned for dinner. Recess until 2.30 p. m.

WEDNESDAY AFTERNOON SESSION AT 2.30.

The COURT: Conceding that the defendants are in fault and that the defendants are liable for the damage or injury done to the boat by contact with the rocks and the injury thus occasioned, upon the facts of this case could the plaintiff recover for the after-occurring injuries by the sinking of the boat? Of course, in determining that question the evidence given on the part of the plaintiff
168 must be assumed as true and the evidence as to this fact, that the mate of the steamboat came to the boat alongside of the plaintiff's boat and the plaintiff's man informed the mate of the boat that she was leaking very badly and asked if the steamer could do anything, to which the answer was that it could not. Nevertheless, the man in charge of the plaintiff's boat did not object to being taken into the tow and to proceed on the journey toward New York. He permitted himself to be taken in tow with the full knowledge of the extent of the injury done to the boat. He had cut away the boat in the inside and had seen the bulge made into the boat by the collision with the rocks and the water pouring in, which they had undertaken to remedy by tying a canvas over the hole. How the canvas was secured and how effectually the canvas

would stop the leak those on board had reasonably accurate knowledge.

Now, the point is whether, in permitting the boat to be taken in tow by the steamer and to be drawn in the tow by the steamer under such circumstances, was not negligence on the part of the plaintiff; and, if so, whether or not there can be a recovery. I do not mean to say that this is necessarily a question of law. I only suggest it to counsel, and also with that I suggest the further question, whether or not that should not be submitted as a question of fact to the jury. That is the point I desire to suggest.

Mr. FROTHINGHAM: I desire to make a point now. I think it will make additional force to your suggestion. I ask for a nonsuit; that it affirmatively appears here that this boat was overloaded, and it was an act of negligence on the part of the plaintiff to overload it. We ask the court to hold that the boat was overloaded, especially overloaded to trust such a load to these inexperienced navigators.

The COURT: While that is the evidence of the witness there is also proof on the part of the plaintiff in the case that this boat had been accustomed to carry up as high as 130,000 brick; she
169 had done that; so with safety would I be justified in saying as matter of law that the boat was overloaded when the proof would show that she had carried a greater load than this with safety.

The negligence of the plaintiff which excuses the defendant from liability is the negligence which contributes to produce the result; that is, which contributes to the act which produces the injury. A carelessness in escaping from the consequence of the injury does not rest upon precisely the same principle. I did not have in mind when I heard that statement this morning this particular view which I have now taken. While it is true that you cannot hold the person to the same degree of accountability when he is in a position of danger which has been caused by the act of the defendant which you can previous to the danger itself, yet often that rule must be received with some limitations; and a very gross act on the part of the injured party which could not fairly be said to have arisen from the excitement of the moment might, perhaps (I do not say it would), still cause the rule of contributory negligence to apply. In throwing this out I do not mean to say I have formed any opinion in my mind about it.

I shall not nonsuit.

Exception to the opinion in regard to the rule of contributory negligence.

Mr. FROTHINGHAM: I ask your honor to rule upon the last point formally.

The COURT: That you add with the grounds of the nonsuit—that of the overloading of the vessels.

Exception by defendant's counsel.

Judge McClelian opens the case for the defense to the jury.

Mr. FROTHINGHAM: I will read to the jury as evidence by stip-

ulation the testimony of WILLIAM RYAN, now deceased, on page 86 of the printed case, as follows:

Q. What was your occupation on October 11, 1876?

A. I was a boatman—captain of the boat (canal) Defendorf.

170 Q. Were you in the tow of the Niagara on that day when an accident occurred to the barge John T. Lee?

A. I was.

Q. How many boats were there in the tow?

A. I should judge about 49 or 50.

Q. Where was your position?

A. I was in the fourth tier, second boat from the outside—on the port side—*i. e.*, the east side.

Q. Where did the accident happen?

A. Probably 400 feet north of Garrison's.

Q. What was the shape of the tow at the time?

A. They were head down the river.

Q. Had they passed West Point?

A. Yes; we had passed around West Point.

Q. Was the tow straightened out?

A. Yes; it was in a straight line down the river.

Q. Please describe the accident from the beginning.

A. The tide sets to the east shore there very strong coming around the point; when she was pulling us off the east shore we broke loose; our lines all parted—five boats all parted together, commencing on the third tier and continuing, so that four boats on the fourth tier broke loose.

Q. Did you see their lines part?

A. I did.

Q. How were these boats fastened in the tow?

A. They were fastened five wide by their own lines.

Q. Was your boat one of those that broke loose?

A. It was.

Q. What became of the portion of the tow that broke loose?

A. They came floating down the river; they all remained attached together.

Q. In what direction did they drift?

A. Toward shore.

Q. Did you see the barge Lee strike?

A. I did not.

Q. Did you see her when she brought up on the rock?

A. I did; she struck the rocks after we broke loose and the steamer had left us.

Q. About how far had you drifted when she struck the rocks?

A. I should judge about one-quarter mile.

171 Q. Did you go back to the barge Lee?

A. I did afterward. After the tow was made up we had all we could do to take care of ourselves.

Q. Who did you find there?

A. A great many.

Q. Do you know the mate to the Niagara?

A. I do. I know him by the name Charley.

Q. Did you see him go from the steamer to the barge Lee?

A. Yes; after we were made fast.

Q. Did he go in a small boat?

A. He did. I saw him going there, but did not hear him talk.

Q. How long have you been navigating the river?

A. I should judge between eleven and twelve years.

Q. In your opinion, if the barge Lee had been properly manned could she have been taken where she would not have sunk?

A. I should think they could.

Q. How long after she struck did she sink?

A. About two hours and a half.

Q. Were there flats in the vicinity where she could have been beached?

A. Yes.

Q. Where?

A. On the west side of the river.

Q. Please again describe the manner in which the boats broke loose.

A. The boat on the port or east side of the third tier first broke; then the four boats in the fourth tier west of her broke loose, and leaving two tiers of five boats and one tier of four boats attached to the Niagara. The single boat from the head tier floated off to the westward, keeping the boats canted to the westward, bringing the tail toward the east.

Cross-examination:

Q. Was this Boathouse point where she struck?

A. No, sir; it was about six hundred feet south.

Q. Were you on watch at the time?

A. I was on deck.

Q. Where in the river was the tow just before breaking loose?

A. She was toward the east shore; more to the east of the middle of the river than the west.

Q. Did you see the tow part?

A. I did. I saw my own lines part.

Q. Did you see the others part?

A. I did see them part one after the other as if cut by a knife.

172 Q. What means were at the command of the Lee to take her where she could be beached on the west shore?

A. We were going down the river with the Niagara after we had been made fast again, and the boat had way enough at the time when going through the water to have run her to the west shore.

Q. How long was it after you struck until you got under way again?

A. About three-quarters of an hour.

Q. Did you see the hole in the Lee?

A. I did not.

STEPHEN VAN RENSSELAER ABLEMAN sworn for defence.

Examined by Mr. FROTHINGHAM:

Q. What is your business?

A. Out-door agent for the Schuyler line of steamboats.

Q. What branch of your business?

A. Making up the tows and getting them fast and collecting the money.

Q. How long have you been engaged in that branch of the business?

A. Pretty close 25 years.

Q. Were you engaged in that capacity in October, 1876?

A. Yes, sir.

Q. You recollect of hearing of this accident to the barge Lee?

A. Yes, sir.

Q. Did you receive some communication in reference to placing the barge Lee in your tow?

A. Yes, sir.

Q. That communication was received by you in some way at Albany?

A. Yes, sir.

Q. Did you give any orders or communication in order—to anybody else to pick up the barge Lee and place her in the tow?

A. Yes, sir; Captain Atherton, on the steamboat Carrie.

Q. What were those orders?

A. Ordered to pick him up at Baltimore.

Objected to by plaintiff's counsel as immaterial because the boat in fact did not pick up this barge; therefore it is entirely immaterial what orders he gave.

DEFENDANT'S COUNSEL: We propose to show by this witness that the orders were communicated to the steamer Carrie to pick
173 up this boat at Baltimore. In pursuance of these orders the steamer Carrie went to pick up this boat and some others, and found the captain of the boat absent and refused to take her, and so stated to these young men, that he would not take the boat in the absence of the captain. We offer to prove by this witness the communication of those orders to the steamer Carrie.

PLAINTIFF'S COUNSEL: Unless the orders were communicated to the other vessel which did.

The COURT: I am inclined to receive this as a part of the history of the case; the effect I will dispose of bye and bye. I think it is proper to show, at all events, how the boat got in the tow of the Niagara.

Exception by plaintiff's counsel as immaterial and irrelevant.

A. The orders were for him to pick up the barge Lee at Baltimore to New York.

Q. By what steamer?

A. Belle, the first boat.

Q. Was the steamer Belle making a trip that day from Albany to New York?

A. Yes, sir.

Q. Prior to the trip made by the Niagara?

A. Yes, sir; noon tow.

Q. On this occasion of the making up of the tow in which the barge John T. Lee was afterwards taken into and attached at Albany who made up the tow?

A. I had charge of making it up, but I, possibly, making it up, had the mate to help tie now and then a line.

Q. Did you on that occasion inspect the lines?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. Did you inspect the lines of this boat that was said to have broken loose?

A. Yes, sir.

Q. Were you informed of the breaking loose of this boat soon afterwards?

A. Yes, sir.

Q. Was your attention then called to it?

A. Yes, sir.

Q. What was the condition of the lines that were used on that occasion to make fast these boats?

A. Good lines; what I call sufficiently strong.

Q. You are a judge of such lines?

A. Well, yes; I profess to be.

174 Q. You have had a great deal of experience in judging of such lines?

A. Yes, sir.

Q. Have you known of repeated instances where lines have been changed by the boatman attached in the tow after they have been inspected by you?

Objected to by plaintiff's counsel.

The COURT: I do not think that is competent.

Exception by defendant's counsel.

DEFENDANT'S COUNSEL: We offer to show that this witness has known of such instances repeatedly; after having discovered them has instructed the boatmen to replace them with good lines on all occasions.

The COURT: I do not think that is competent.

Exception by defendant's counsel.

Q. If the lines that attached these boats together was a defective line, was it the line that you inspected on this occasion?

A. I don't think it was; it could not have been.

PLAINTIFF'S COUNSEL: I move to strike that answer out. I think it is a mere argument; not admissible.

The COURT: I think it is a little more than argument. It involves in its answer the amount of attention which he bestowed upon the inspection of the lines. It is a question for his own con-

science; therefore, whether he is able, after remembering the extent of his inspection, to say as a fact that this boat which broke loose broke loose in consequence of the defective line that was not the line which he inspected, I think it is competent.

Exception by plaintiff's counsel.

Q. After the boats left Albany your duties ceased?
A. Yes, sir.
Q. After the tow has left in charge of the steamer?
A. Yes, sir.
Q. That has been the custom for years?
A. Yes, sir.

Cross-examination.

By Mr. ANDREWS:

Q. What was the name of this boat the lines of which broke first in this tow—one on the port side?
A. I don't know, only from the testimony that I heard here.
175 Q. From the testimony here; what was it?
A. I don't remember that.
Q. And still you can state you remember inspecting her lines?
A. I do.
Q. And you heard about it; heard of the accident immediately after it occurred?
A. Yes, sir; just as quick as we got return from it my attention was called to it.
Q. Still you have never known her name?
A. No, sir; I don't think I could know at the time.
Q. Never received any report from the officers of the Niagara, stating the name of the boat?
A. Not that I remember.
Q. You never examined the lines of that particular boat to see whether they had been changed—whether they were the same or not?
A. I never saw her after she left Albany.
Q. Never saw the lines?
A. After she left Albany; no, sir; not to my knowledge.
Q. You say there was a rotten line—one rotten line?
A. No, sir; I never heard that.
Q. You were living at Albany and all this time in the employ of the Schuyler Co.?
A. Yes, sir; living there.
Q. You never heard that this accident occurred in consequence of a defective line in that tow-boat?
A. No, sir.
Q. Never heard that the mate found it to be a defective line?
A. No, sir.
Q. You knew Nelson, the mate?
A. No, sir.
Q. Never talked the matter over with him?

A. No, sir.

Q. You say if this was a defective line.

A. I did not discover it.

Q. That is all you say?

A. Yes, sir.

Q. Do you say if it was a defective line it was not one that you examined?

A. No, sir; I do not say that. I say I ought to have discovered if it had been, but to my knowledge I did not.

Q. Did not you repeatedly state before that if this line was defective it was one that you did not inspect?

A. One that I did not put out; I did not put out no defective lines that I know of.

176 Q. You remember particularly about this tow?

A. Well, no; not more particular. I was attending this last trial and one previous to this.

Q. You remember back to the time in 1876, when the tow was inspected?

A. My attention was called to it as soon as I got returns how the tow was made up.

Q. You kept your mind on the lines?

A. No more than I was doing.

Q. You don't remember that you particularly examined every line?

A. Yes, sir.

Q. Did you hear the mate testify?

A. Not all of it.

Q. You did not hear his testimony about the way you examined the lines?

A. No, sir; not all. I heard some of his testimony.

Q. But you swore you particularly examined every line?

A. Yes, sir.

Q. What was the form of your inspection?

A. I would go on a boat to show him where to make fast, pass out an end of a line. If I don't think it is sufficient line I say, "Captain, give me a better line."

Q. What examination?

A. Then he gives me a line to take him up. I stand in the stern of the boat and look at the line.

Q. You think if the line does not seem to be good enough, then you tell him you want another?

A. Yes, sir; or double that in some way; make it what I think is sufficient to tow him.

Q. The lines of this boat in particular you don't remember?

A. No, sir.

Q. You don't know that one of them was an old-looking line?

A. No, sir.

Q. It was rather a matter of form generally going over, taking a casual glance?

A. No, sir; the boats only came one or two from Troy, sometimes 6 or 7. I collect and go to the office.

Q. You assume yourself, don't you, usually, that they will have an interest in them?

A. No, sir; I know them; they have not got that interest. I know they want watching.

177 Q. You will agree that you did not watch this one quite closely enough?

A. No.

Q. You do not doubt that the line broke; you don't doubt but what it was a rotten line?

A. I doubt most anything I do not see.

Q. You heard the mate say it — a rotten one?

A. No; I don't know that I have.

Q. Wasn't you here at the last trial?

A. Yes, sir.

Q. Did not you hear him then say it was a rotten line?

A. No, sir.

Q. Did you hear him testify?

A. Only part of it.

Q. How many boats were there in that tow when it left Albany?

A. Forty-six boats; 45 boats; between 44 and 45.

Q. How many tiers?

A. I think they ought to be about 9 tiers—10 tiers.

Q. How many were taken in after she left?

A. They had orders to pick up or to make up 49 or 50 boats, if they got them all, and the report shows that.

Q. What did the report show in respect to that?

A. I am not sure; I don't look at the captain's returns unless they give it to use to collect the tow.

Q. Still in the employ of this company?

A. Yes, sir.

Q. Have been so all the while?

A. O, yes.

Redirect examination.

By Mr. FROTHINGHAM:

Q. Has it been the custom for a great many years or always, in your experience, to make these boats fast together with their own lines?

A. We never lend them a line.

Q. The boats furnish their own lines?

A. Yes, sir.

Q. And not by the steamboat?

A. Not by the steamboat.

RUDOLPH ATHERTON sworn for defense.

Examined by Mr. FROTHINGHAM:

Q. Business?

A. Master of one of the helpers.

Q. What steamboat?

A. Carrie.

178 Q. How long have you been acting in that capacity?

A. Ten years.

Q. How long have you been a boatman?

A. I have been here on the river 13 or 14 years.

Q. Have you been in the habit of navigating the Hudson river?

A. Yes, sir.

Q. Between Albany and New York?

A. Yes, sir.

Q. Familiar with the waters of the Hudson?

A. Yes, sir.

Q. Do you recollect of going with your steamer to New Baltimore to pick up the John T. Lee?

A. Yes, sir.

Q. For the purpose of putting her in what tow?

A. Belle's tow.

Q. Was that about October, 1876?

A. Yes, sir.

Q. You did go there?

A. Yes, sir.

Q. Did you find the John T. Lee there?

A. Yes, sir.

Q. Whom did you find aboard of her?

A. Two young men or boys; recollect them; young men or boys.

Q. Did you have any conversation with them about going on the trip?

A. When I went down there was other barges there; I hollered to them and says, "All ready?" Answer came back, "All right."

Plaintiff's counsel objects to this conversation. Overruled. Exception by plaintiff's counsel.

A. They laid so I could not take them all at once, so when I rounded to — I will take the two lumber barges, come back after you. I took them and put them on and came back; I saw the two young men there was going to put my hawser out and put them in; they said the captain had not come; I said, "If the captain is not here I will not take you then;" and so I took my line back again and went off with the tow.

Mr. ANDREWS: I move to strike that part out, "the captain not here; I will not take you," as incompetent, irrelevant, and hearsay.

Overruled. Exception by plaintiff's counsel.

Cross-examination.

Examined by Mr. ANDREWS:

Q. You was in the employ at that time of the Schuyler Tow-Boat Line?

A. Yes, sir.

179 Q. And have been ever since?
A. Yes, sir.
Q. That helper was belonging to Schuyler Tow-Boat Line?
A. I don't know who she belonged to.
Q. She was in the employ of the line, doing business for the Schuyler Tow-Boat line?
A. Yes, sir; did work for them.

Redirect examination.

By Mr. FROTHINGHAM:

Q. Was that the reason why you would not take them, because the captain was not aboard?

Objected to by plaintiff's counsel.

The COURT: What he said I will allow, but his mental operations I won't take.

Exception by defendant's counsel.

EDWIN S. CUNNINGHAM sworn for defence.

Examined by Mr. FROTHINGHAM:

Q. Have you been a navigator of the Hudson river?
A. Yes, sir.
Q. Reside in Albany?
A. Yes, sir.
Q. How long have you been a navigator?
A. Twenty-five or thirty years.
Q. What capacity?
A. Captain.
Q. Captain of various steamboats?
A. Yes, sir.
Q. In 1876 were you captain of the steamboat Winants?
A. Yes, sir.
Q. In October, in that year, did you go to New Baltimore with your steamer?
A. Yes, sir.
Q. For what purpose did you go there?
A. Pick up boats that were lying there to put in the tow.
Q. Boats that were on your orders?
A. Yes, sir.
Q. Was the John T. Lee one of the boats?
A. I guess she was not on the orders for me to pick up. I did pick her up.
Q. How did you happen to pick her up?
A. Because we were there and wanted to go down the river. I did take them.
180 Q. Was the captain aboard?
A. Yes, sir.
Q. And where did you place them? You took them out in the river with your boat and placed them in the tow of the Niagara, which was passing down the river?

the condition of things, there was anything omitted to be done which ordinary care and skill under those circumstances in a condition of peril would have applied.

Now, I think the true way of examining this witness would be, though I do not want to make any suggestion to you—is to prove by him what could have been done under the circumstances to save the boat, and then the jury will apply that evidence of the witness to the facts of this case.

183 Q. Under the circumstances that I have proposed, what could have been done, in your opinion, to have saved that boat?

A. When I found the tow had broken in two, what would I have done? I would have cast her lines off and let go her anchor right there; let the rest go on.

Q. In your opinion, would that have saved the boat?

A. Yes, sir.

Q. In your opinion, would a man competent to command such a barge have done that act?

Objected by plaintiff's counsel; that is only evading the ruling.

The COURT: I think that is rather inferrible. I will think of that question in a moment.

Q. In your opinion, is there any other way that the boat could have been saved under those circumstances?

A. That ends that part of the question. I would have cast her off and dropped her anchor.

Q. If there was any other way before she struck the rocks?

A. No, sir.

The COURT: After she had struck the rocks, what could have been done to have preserved the boat?

A. I should have jumped down in the hold and saw where the leak was, if possible to see inside, to see any place where there was any water coming in. I would go to work bating it up by putting something over the hole—a piece of quilt or pillow—anything else; shove it down; nail it down; spike it down.

Q. If that had been done, in your opinion, would the boat have been saved?

A. I think so; yes, sir.

Q. Suppose she had a small boat aboard, could not a line have been taken out?

Objected to as a leading question.

Q. Suppose there had been a small boat aboard that barge, could anything have been done?

A. Yes, sir; run lines ashore, if we had any; could run a line ashore and hold her; drop her down.

Q. Suppose there had been a proper watch aboard that barge
184 at the time of the parting of this tow, how long would it have taken such a person to discover the parting?

A. I suppose there was likely a watch.

The COURT: Suppose there had been one?

A. It would not taken no time.

Q. Before the parting of the tow?

A. They would know it at once, of course, if they were on watch.

The COURT: I think I will allow you to go as far as this. What did good, ordinary judgment in the management of a boat under such circumstances require to be done? That applies to the condition of affairs when the tow was discovered to be broken.

A. Just what I said in the first place—let go her lines and drop her anchor.

The COURT: You think good, ordinary judgment required that to be done?

A. Yes, sir; nothing else could be done any better than that.

Q. That is taken into consideration, the location?

Objected to by plaintiff; witness has not been shown to know anything about the location.

The COURT: Now, you may consider me as ruling upon the last question that was objected to, and I said I would consider.

DEFENDANT'S COUNSEL: Al- right; we will accept this last question of the court as a substitute.

The COURT: In answering the question, as you have done, where do you assume the breaking to have occurred and the collision to have taken place?

A. By the evidence here given, I have heard.

The COURT: What was it?

A. I have heard all the evidence.

The COURT: We don't know what you have heard.

A. I have heard that this tow broke adrift in turning West Point, and if I was there and on watch I would do just as what I told you I would do. Taking into consideration that the tow broke adrift just turning West Point and knowing where I was and knowing what was before me, why I should drop the anchor and hold myself there.

The COURT: Your answer was based on the assumption that the line broke upon making the turn at West Point?

A. Yes, sir; in turning around.

185 The COURT: Would there be any difference in the answer if the accident had happened two or three miles either north or south of that point?

A. No, sir; I should do the same thing.

The COURT: It would not make any difference two or three miles one way or the other?

A. No, sir; I would do the same thing.

Q. Would it make any difference in flood of the tide?

A. No, sir; if the accident occurred, the tow broke in two, either flood or ebb, I would do the same thing.

Cross-examination.

By Mr. ANDREWS:

Q. How long since you were in the employ of the Schuyler towboat?

A. Four years ago.
Q. Was you discharged?
A. No, sir.
Q. For what reason did you leave?
A. I sold out my interest of that boat.
Q. You had some interest in the boat?
A. Yes, sir; I owned the third of the Winants.
Q. How were you compensated for your services?
A. I was paid so much an hour for my boat for doing work.
Q. What is your business now?
A. Steamboating.
Q. Whereabouts?
A. If I live to next season I will commence with the Iron Steamboat Company, running to Long Branch. I was in the Plymouth Rock last year, running to Long Branch.
Q. Have you ever commanded a steamer towing vessels to New York city?
A. Yes, sir; the America.
Q. When?
A. 25 years ago.
Q. How long?
A. In captain's office? I never was hired to go captain of a through boat. I presume I have the ability, or I would never have been put there. I was there when the captain was sick.
Q. And without any previous experience in navigating those dangerous experiences?
A. No, sir; I had lots of them.
Q. In what capacity?
A. Acted capacity in the Baltic; on sloops several years. Baltic was a steam tow-boat.
186 Q. What line was she?
A. Schuyler line.
Q. You placed this vessel in the hawser tier?
A. Yes, sir.
Q. Have any orders from the captain or officers of the steamboat in respect to that subject?
A. Yes, sir.
Q. From whom did you have orders?
A. From the captain of the Niagara.
Q. Put her in the hawser tier?
A. Yes, sir.
Q. Where did you receive those orders?
A. From the captain, right alongside the steamboat.
Q. You went and consulted him before you located here?
A. Yes, sir; always do that by boats.
Q. In respect to barges, if the steamer towing the barge does its duty, what have the men on board of the barge—what duties have they that will effect the safety of anything on board in the tow?
A. They have got to take care of their own barge.
Q. Suppose there was not a man put on the barge; suppose she was fastened in securely and properly by the proper lines—had

the proper breast lines and rear lines—there was not a man aboard of her, she was taken down properly by the steamboat, would there be any harm done, any necessity of men?

A. Yes, sir; the lines might chafe off; might spring aleak.

Q. I am speaking of cases where she is taken, where there is nothing of that kind occurred. Suppose lines do not chafe off; suppose she don't spring aleak; what is there for anybody to do?

A. I do not know as anything.

Q. So that ordinarily, where the steamboat company do their duty, it don't make much difference how experienced the men are?

A. Yes, sir; it makes a good deal of difference.

Q. You say you have located in answering this question that you would throw out an anchor, let your lines, down there off West Point, if the tow broke apart—that would be your course?

A. Yes, sir.

Q. Ever anchor at that point?

A. Yes, sir.

Q. Right between West Point and Boathouse point?

A. I have anchored just about a length of a boat below
187 Boathouse point and right directly opposite of West Point.

Q. At this point where you say you would let the anchor go, have you ever anchored there?

A. No, sir.

Q. There is a little rock on both shores?

A. Yes, sir; it is in rock where I would anchor.

Q. In saying you was there and anchored off here, you don't know whether the anchor would hold?

A. We never thought when we lay to anchor.

Q. You don't know, then, that would have saved the vessel—that would have held the barge?

A. No, sir; never let an anchor go whether it will hold or not.

Q. You would have cast her lines off and let go her anchor?

A. Yes, sir.

Q. That is, if you were attached to a large number of canal-boats fastened to them, and in the position where this barge was, you would have just struck out alone, break loose from all the rest, and let your anchor go?

A. That is what I would have done.

Q. And with five boats on the side of you—on the west side of you—done the same thing?

A. Certainly I would.

Q. Would not that be likely to prevent your anchor from holding?

A. No, sir; because they would slip right by me.

Q. If your anchor did not take hold they would not?

A. If it did not? I don't know whether it did or not.

Q. Suppose you were very close to the shore; do the same thing?

A. Yes, sir; drop the anchor.

Q. That would not be likely to do you a great deal of good there?

A. Right where that boat parted their lines it was safe to let go.

Q. Where do you assume?

A. About three or four hundred feet from the shore it broke in two.

Q. Suppose you had let go the anchor. There was no motive power, simply an ebb tide moving them all down together, then the other end of the boat would have swung around?

A. Yes, sir.

188 Q. They would have been more likely to strike the rocks than left in the tow?

A. No, sir; there is no rocks there where I let go my anchor.

Q. But the evidence is all along Boathouse point?

A. Yes, sir; this is about Boathouse point.

Q. I am speaking now where this boat went ashore in that vicinity. I am assuming that she broke loose opposite West Point and just near Boathouse point, where the tide would naturally take her right upon the rocks there. I want to know if then, if she was only three or four hundred feet off right where she would have gone on the rocks if left with the tow, then if you would have let go her anchor.

A. I would have been all right.

Q. Would not she be more likely to strike the rocks?

A. No, sir; not that distance. She was only a hundred feet long.

Q. You do not think the other boats on her side going with the ebb tide would have no effect?

A. No, sir.

Q. How if she was 100 feet off—suppose she was not but 80 feet off—and you would let go her anchor, and the anchor had stood, and then she would — struck the rocks quicker?

A. I would not let go my anchor then; I would cast the boat off.

Q. If you cast the boat off what would be the effect of that?

A. I would shove her stern—take a pole and shove her stern.

Q. Why, she was on the east side, having all the pressure of the whole of this broken part of this tow.

A. There is no pressure there of drifting, a sagging eastward.

Q. You say you would shove her stern?

A. Yes, sir; and then take my boat, if I had one, and run a line ashore.

Q. You think in that way you would save her from going on the rocks?

A. I think I would do that or the next best thing to save the boat.

Q. You were never placed in such an emergency?

A. Yes, sir.

Q. You have been in that spot?

A. Yes, sir.

189 Q. With a tow broke apart?

A. No, sir.

Q. Is not this conclusion of yours one that you have made after an accident has occurred and where you have sat down and thought if you had been there and had thought about it, and had not been

excited, you would have done so and so? Are you pretty sure you would have done the same thing?

A. Indeed I would.

Q. You never lose your self-possession?

A. I am pretty level-headed; it is not everybody that is level-headed, but I know what I am doing all the same.

Q. You think if a proper watch had been kept on the barge the fact that the tow would have been broken apart would have been discovered at once?

A. Yes, sir.

Q. If a proper watch had been kept on the steamer they would have discovered at once that the tow had broken apart?

A. No, sir; they could not.

Q. Is there any difference between the distance of this last barge and of the steamboat and the barge?

A. No, sir.

Q. Then why could not the steamer, if they kept a proper watch, had seen the tow part?

A. Because they are so far stern they can't see.

Q. Is not there just the same difficulty with a person on a barge?

A. No, sir; they are all drifting.

Q. Can't the steamer tell by the lights upon the tow-boats?

A. Yes, sir; there is a hundred fathom between the tow and the steamboat besides the length of the tow, with only just about 3 or 4 lengths of canal-boats between where this boat lay and where she is broken in two.

Q. If you had been on the steamer and kept a sharp watch with all the skill you have shown, don't you think you would have known in less than half an hour or an hour that your tow had separated?

A. I think I would have less than an hour.

Q. Less than a half hour?

A. Yes, sir.

Q. Would not you have discovered it at once if you had been on the watch?

A. No, sir; if I had been looking right at that tow I could
190 not tell, because the distance is so great. I have done that many a time. America split apart with me once.

Q. When was it that the America split apart?

A. About the last year I was in the business; it split apart right at Catskill.

Q. Where do you understand that this tow was picked up or had broken portion of it?

A. Right below Garrison's there somewhere; Garrison's is a half mile or so below Boathouse point; they drifted.

Q. That you have heard?

A. I have heard the witnesses here. Of course, I have taken the situation in and made my calculations accordingly.

Q. Was you here when the case was tried before?

A. Yes, sir.

Q. And the first time also?

A. Yes, sir.
Q. Sworn each time?
A. I guess the second time I've been sworn.
Q. Did you give your opinions on these questions of management at either of the former trials?
A. No, sir.
The COURT: You were speaking of the need of having good men on board of the canal-boat, and the reason that you gave for it was that the lines part sometimes from chafing?
A. Yes, sir.
The COURT: Is that usual or unusual?
A. That is usual; lines chafing and parting.
The COURT: Even though they were good lines?
A. Yes, sir; cut off; good lines—good, new bright lines; known them to cut off. I have been right there; back right up against the tow and seen this thing done, and lay there and hold them until they got out new lines—other lines.

LEVI L. DE NOYALLES sworn for defense.

Examined by Mr. FROTHINGHAM:

Q. Where do you reside?
A. Haverstraw, N. Y.
Q. Business?
A. Steamboating.
Q. How long have you been engaged in that business?
A. Seventeen years.
Q. In what capacity?
A. All capacities.
191 Q. Now captain of a steamer?
A. Yes, sir.
Q. And have been how many years?
A. Fourteen years.
Q. Have you been navigating the Hudson river during that time?
A. Yes, sir; part of it.
Q. You are familiar with the waters of the Hudson?
A. Yes, sir.
Q. You are familiar with the locality about West Point?
A. Yes, sir.
Q. Have you bought and sold barges and known of their sale?
A. I never bought or sold any. I have known of the sale of barges.
Q. Did you know this barge, John T. Lee?
A. Yes, sir.
Q. Did you know her market value in the year 1876?
A. I considered her worth twelve to fifteen hundred dollars at that time.
Q. You did know her value at that time?
A. Yes, sir; from 1,200 to 1,500 dollars. I would not want to put an exact valuation on it.

The COURT: What boat are you captain?

A. Quaker City at present, New York harbor.

Q. (Showing map.) What is that chart?

A. That is a coast survey of the Hudson river from Haverstraw to Poughkeepsie.

Q. Are you in the habit of consulting that chart?

A. I have on different occasions.

A. Do you know the marks upon it?

A. Yes, sir.

Q. Explain the different marks. What are the figures in the white space between the dotted lines?

A. Fathoms of water in the river.

Q. What do the figures on the shady portion indicate?

A. Number of feet of water.

Q. What are those figures?

A. Black mud; means black mud bottom.

Q. Some other still?

A. There is gray mud; gray mud, sticky; means sticky bottom.

Q. That in your opinion is an accurate survey of the river?

A. Yes, sir; rks. stands for rocks; hrd. s., hard sand.

192 The COURT: What is bottom off Boathouse point?

A. Black mud mostly; that bottom is all mud all through both sides of the river from West Point to Boathouse point.

Q. Where on that map is the location of the chemical works?

A. About here (ind.).

Map offered in evidence by defendant's counsel and received, and marked Defendant's Ex. No. 3. C. B. P.

It is stipulated by counsel in making this case that defendant's Exhibit No. 3 need not be attached to the case, and that either party may use and exhibit the same to the court on the argument of any appeal in this case as if the same had been attached to the case.

Q. Did you hear the hypothetical question put to the last witness, Captain Cunningham?

A. Yes, sir; some of them.

Q. Relative to the position of this tow when broken in two?

A. Yes, sir.

The COURT: What did good, ordinary judgment under those circumstances require to be done at the time when the tow broke, assuming that the tow broke in making the turn at West Point?

A. Soon as I discovered the tow had parted I should have cast my barge loose and let go my anchor before I got ashore.

Q. In your opinion, if that had been done at this time could that boat have been kept from going on the rocks?

A. I think she could without a doubt; the water is not very deep there; no trouble to anchor.

Q. Suppose that barge laden with 127,000 brick was then in charge of two young men under 21 years of age, one of whom was the cook on the boat, and he was making his first trip as a navigator on the Hudson river, and the other had made but one other

trip on the Hudson as a navigator, and the captain of the barge was absent. Under those circumstances, in your opinion, was the barge properly manned?

A. No, sir.

Objected to by plaintiff. I believe that has been excluded once.

The COURT: I think not. I think I allowed that.

193 Exception by plaintiff's counsel.

Q. If she had been properly manned on that occasion, do you think she could have been saved?

Objected to by plaintiff's counsel.

The COURT: That particular question I did exclude.

Q. After the boat had drifted upon the rocks and the holes had been made in her of the character testified to by the witness Smith, what, in your opinion, could have been or should have been done?

Objected to unless they consent that the same question may be put by us.

PLAINTIFF'S COUNSEL: I will withdraw it; it will save time.

A. From the way I understand, they did put a canvas over the hole and pumped the water out to get at the leak inside. If they done that, all they had to do was to put something over it and shore it down and fasten it—stop the leak—that is, if they put a pillow there. I have done things of the same kind myself.

Q. If after the canvas had been placed under the boat and you had found the water gaining upon you what would you have done?

A. Attempted to get the barge ashore.

Q. In what way?

A. Had no other way to get her ashore, I would take a line ashore—heave her ashore.

Q. Have you known that to be done?

A. I don't know that I ever have that to be done there on such an occasion.

Q. With a broken barge ordinarily done?

A. Yes, sir.

Q. Where the boat has the capacity of carrying 225 to 230 tons and she is loaded with 250 tons, is it more difficult to manage such a boat in such a situation?

A. Yes, sir; it would be; she certainly would sink quicker.

Q. If after a canvas had been put over the hole in the boat and had stopped the leak so that the pumps could pump the water out of her, would such a canvas have been made securely fast?

A. I think it could; yes, sir; after the canvas over a leak

194 in the barge and the leak in the bottom there is a great pressure in the canvas; pretty hard work to move it, and especially if the boat was under way; securely fastened to the four corners, I think it would stay there without doubt, if it was properly tied.

Cross-examination.

By Mr. ANDREWS:

Q. In whose employ are you now?
A. Schuyler's.
Q. Schuyler Steam Tow-Boat Line around New York harbor?
A. No, sir.
Q. You are not running up and down the river at present?
A. Not at present.
Q. Have you ever been employed on barges in tows?
A. Yes, sir.
Q. How long ago?
A. I think it was in 1864 or 1865.
Q. Towed up and down the river on a barge?
A. Yes, sir.
Q. For how long?
A. One part of one season.
Q. How many trips did you make on a barge during that time?
A. I could not tell you; perhaps 4 or 5.
Q. Ever been towed on barges since?
A. No, sir.
Q. So that 4 or 5 trips you made on a barge was the only experience you had?
A. Yes, sir; towed around the harbor on lighters.
Q. Were you ever cast adrift from a barge off West Point?
A. No, sir.
Q. Ever cast adrift on any vessel at West Point at night?
A. No, sir.
Q. You never had any actual experience that these men did off West Point in your life?
A. No, sir.
Q. Is it not an ordinary expedient amongst navigators, when a hole is knocked in a vessel, to put a canvas over it?
A. If you can get a canvas over it.
Q. Is not that expedient known among navigators?
A. Yes, sir.
Q. And now I ask you if it was not frequently done?
A. Yes, sir.
Q. Under certain circumstances, it is good judgment to do it?
A. Always good judgment to commence to stop a leak in that way.
195 Q. It is judgment to put the canvas over the hole to stop the leak itself?
A. If you can get it there.
Q. Assuming that before you get the canvas over the leak a quantity of water has got into the boat through the hole and then the canvas is put over, is not it good judgment to go to work to pump the water out?
A. Yes, sir.
Q. In order to get at the hole so you can work at it from the inside?

A. Yes, sir.

Q. Is not it good judgment after you done that to cut away the ceiling on the inside of the boat so you can get at the hole to work at it?

A. Certainly it is.

Q. And this having been done by these men on the barge that night, was not it good judgment on their part to do as they did in these respects? I have asked you about the canvas, pumping out the water, and cutting away the ceiling.

A. Yes, sir.

Q. In those particular respects, putting the canvas from pumping, putting and cutting away the ceiling, could experienced navigators have done any better?

A. I don't think they could.

Q. You heard their testimony?

A. Yes, sir.

Q. Was not it good judgment to attempt to put a pillow in that hole to stop the leak?

A. Not with the view.

Q. (Repeated.)

A. I don't think it was unless the men took something more to hold the pillow down.

Q. And is not it good judgment to fasten a pillow in a leak of that sort?

A. Certainly it is one way to get there to fasten it.

Q. Is not it good judgment to try to do it?

A. Yes, sir.

Q. Suppose the water for some reason or other, after you got that pillow there and before you got it fastened, comes in so fast as to drive you away, what are you going to do then?

A. Get out.

Q. That was good judgment?

A. I should say so.

Q. Do you know whereabouts this tow broke loose?

A. Only from my judgment of the evidence here.

196 Q. You said a while ago when a tow broke loose you would have cast anchor?

A. Yes, sir.

Q. Whereabouts did you assume, when you made that answer, that the tow broke loose?

A. Between Boathouse point to West Point; four or five or six hundred feet from Boathouse point.

Q. We will assume, instead of breaking loose when the John T. Lee was 400 or 500 yards from Boathouse point, that the tow broke in two when the boat was less than 100 feet away from Boathouse point, what would you have done?

A. By being in that position on the last tier I would have got my barge out of that position; two men could have hauled them out.

Q. Would you have cast your anchor?

A. Certainly, before I went ashore.

Q. We assume that this tow broke in two when the barge was less than 100 feet from the rocks of Boathouse point; would you have cast your anchor, there being less than 100 feet?

A. It would be a question whether I would or not.

Q. If you had not cast your anchor what would you have done?

A. I would have dropped the barge back, let go, and took a line and hauled her right alone; stood on the canal boat alongside.

Q. Then what would you have done after the tow had gone away and left?

A. After I got clear of the tow, I would have taken a boat and run ashore.

Q. Suppose you would have cast your anchor, what would have been the first result of that?

A. According to which way the barge would swing.

Q. Ebb tide you cast your anchor, your being within 100 feet of the shore?

A. Make it within 50 feet.

Q. What would have been the first effect if your anchor had taken hold?

A. Stopped the barge.

Q. Then what would have been the effect of the ebb tide after she had stopped?

A. No effect whatever; the anchor would have held it.

Q. Which way would the ebb tide have moved the barge?

A. Might have swung her ashore.

197 Q. It would not hit?

A. It would not hit.

Q. That is your judgment?

A. Yes, sir; tide does not set right straight on Boathouse point.

Q. How does the tide set?

A. The tide turns before it gets——

Q. Does not it turn after it gets to Boathouse point—begin to flow to the west?

A. No, sir; I mean the tide sets to the eastward. If you are above Boathouse point and your tow in you would be apt to hit above Boathouse point.

Q. This boat we understand did drift on Boathouse point?

A. I don't know that she did.

Q. Is — not your understanding?

A. No, sir.

Q. Assuming that she did on Boathouse point, what, in your opinion, carried her there?

A. The tide there.

Q. Then the tide does carry a boat on Boathouse point?

A. Yes, sir; take a tow-hawser tier apart, adrift, they would be apt to set on Boathouse point.

Q. If when this tow broke in two they were within 100 feet of Boathouse point it would have been a question with you whether you would have dropped your anchor or not?

A. Yes, sir.

Redirect examination.

By Mr. FROTHINGHAM:

Q. And you would have been ready *if* to determine that question right there?

A. Yes, sir.

Q. About this tide setting a tow there, would it set the whole tow over further than it would a single boat?

A. Yes, sir.

Q. Why?

A. You take a whole tow, four or five boats abreast, the tide sets over to close to Boathouse point, and the tide will set out down the river. This barge being on the inside, the tide would press her over.

The COURT: In other words, if a tier of boats going out, further out in the river, and the force of the current gets pretty close to the point?

A. Yes, sir; if the tide is out solid, Boathouse point, you could not get a tow down.

Q. Does not the tide strike the rock—form a sort of cushion there?

A. Yes, sir.

198 Q. So that a small boat afloat there would not be apt to go in as far as the rocks?

A. I don't think it would flow there with the ebb tide.

The COURT: You came to the conclusion it would be unsafe to let go your anchor?

A. I would take a boat and run my line ashore; make a small line fast, and went forward and got it on that barge and headed it up the river with the tide. It is an old saying "no good boatman goes ashore with an anchor on his bow."

Q. In your opinion, was it good judgment to put that pillow in that hole and not fasten it?

A. No, sir.

Q. In your opinion, if the canvas was over the bow of the boat, and the pillow to fasten, could the water come in to drive you away?

A. I don't think it could, after being pumped out.

Q. In your opinion, after the canvas had been put over a hole, and the pillow had been put into it, it was possible to pump the water out under those circumstances; in your judgment, could a pillow have been fastened there very easily?

A. I think it could.

Judge MCCLELLAN: How far south of the north end of Boathouse point is Garrison's?

A. Somewhere about a half mile.

Judge MCCLELLAN: One man has testified positively where this accident occurred was to the west; that would be 400 feet north of Garrison's; the tow at that time headed down the river, straightened out at the time the lines parted; at that time and in that place was there any difficulty whatever in anchoring?

A. No, sir; the tide sets straight down below Boathouse point, along the east shore.

Judge McCLELLAN: And, if it happened coming around West Point, how is the shore above Boathouse point?

A. A little all the way from Boathouse point up to the lower part of Magazine point.

Judge McCLELLAN: And where would if a boat had broken loose coming around West Point have drifted?

A. Near in above Boathouse point.

199 Judge McCLELLAN: Right on this flat?

A. Yes, sir; if she had been east of the middle of the river.

The COURT: How far is Boathouse point from Garrison's dock?

A. About a half mile.

The COURT: Do you know whereabouts 600 feet would be from Boathouse point down the river?

A. (Looking at coast survey.) My opinion, she struck on a side somewhere.

The COURT: There are no rocks between Boathouse point and Garrison's except right on shore—bold shore?

A. No, sir.

The COURT: No rocks on which her bottom could have scraped?

A. I don't think so.

Mr. FROTHINGHAM: What is the distance from West Point to the chemical works there?

A. Call it about four miles (looking at chart).

Mr. FROTHINGHAM (showing witness diagram): Look at that diagram, marked EX. A, C. B. P., April 24, 1884. State whether that is a correct chart or diagram of the river.

A. I don't think it is.

Mr. FROTHINGHAM: Is there any such point there?

A. No, sir; not that shape.

Mr. FROTHINGHAM: Or any other that shape?

A. No, sir.

Q. Does the shape of the shore indicate the direction of the tide?

A. Yes, sir; in most cases.

Recross-examination.

By Mr. CADY:

Q. If there had been nothing to interfere with the fastening of that pillow, no water rushing in so as to drive a man away, would two men have been enough to do the work; two men down in the hold?

A. Yes, sir.

Q. While one was at work at the pumps up above?

A. Yes, sir.

Q. When did you last see the Lee before she sank?

A. I don't remember exactly. I towed her a number of times around the harbor.

A. Been on board of her?

A. Yes, sir.

200 Q. How many times?
A. I could not state.
Q. When were you last on board?
A. I could not tell exactly.
Q. Were you on her any time within 10 years before she sank?
A. Yes, sir; sure.
Q. How are you sure?
A. I know by towing her; picked her up at Thirtieth street.
Q. How many times on board within 10 years?
A. I don't know; once and maybe 20 times.
Q. It may have been not more than once?
A. Yes, sir.
Q. Simply been on her deck?
A. That is all.
Q. Never examined her for the purpose of determining her value?
A. No, sir.

Redirect examination.

By Judge McClellan:

Q. A man to put a pillow in there would want to use tools?
A. Yes, sir.
Q. Your idea of fastening something over there would be to shore it up with upright timber to the deck?
A. Yes, sir.
Q. If it be made suitable length?
A. Yes, sir.
Q. And the water, in your judgment, take the description of this hole, capable of being pumped out, if it was by one pump, as it is proved, and the water at that time having come in through that hole so fast, so as to drive any ordinary prudent man from his work, and still the boat to be able to live in a tow two hours before they discovered they were sinking?
A. No; not by any means.

William H. Foote sworn for defence.

Examined by Mr. Frothingham:

Q. Where do you reside?
A. Brooklyn.
Q. What is your business?
A. Tug-boating.
Q. Have you been commander of a steamer?
A. Yes, sir.
201 Q. How many years have you been a boatman?
A. About 25 or 30.
Q. Have you been a navigator of the Hudson river?
A. Yes, sir.
Q. Its whole length where it is navigable?
A. Yes, sir.
Q. Are you familiar with the Hudson river about West Point and that locality?

A. Yes, sir.
Q. In what capacities have you navigated the river?
A. All capacities, from cook up.
Q. How long have you been a master of a vessel?
A. About 25 years.
Q. Have you built barges?
A. Yes, sir.
Q. Have you owned them?
A. Yes, sir.
Q. Bought and sold them?
A. Yes, sir.
Q. Did you know the barge John T. Lee in 1876?
A. Yes, sir.
Q. Did you know her market value in 1876?
A. Yes, sir; I remember at that time.
Q. What, in your opinion, was the market value of the John T. Lee at that time?
A. I believe $1,200.
Q. You have been engaged in the towing business also?
A. Yes, sir.
Q. Did you hear the hypothetical question put to Captain Cunningham relative to the situation of this tow when it was broke apart?
A. Yes, sir.
(Question read by stenographer:) "What did good, ordinary judgment in the management of a boat under those circumstances require to be done?"
A. Let go my lines and let go my anchor. I believe that is what anchors and chains are put on barges for.
Q. Have you had experience at that place?
A. Yes, sir; sailing vessels. I have seen a whole tow anchored just below there.
Q. If the barge, under such circumstances, was in charge of two young men, one of whom was under 21 years of age—one of whom was the cook—who had no experience as a navigator, except his trip around New Baltimore to that place, the other of whom had made but one trip as a navigator on the Hudson, in your opinion, was that barge properly manned?
A. No, sir.
202 Q. In your opinion, under those circumstances, if she had had an experienced navigator aboard why could she have been kept off the rocks?

Objected to and not answered.

Q. Would not the anchor cast in that place kept her from going on the rocks, in your judgment?
A. Yes, sir; I think it had good holding ground from mud.
Q. Suppose that after the tow had broken in two a portion of the tow had drifted from near the middle of the river—nearly east of the middle of the river—on the shore or on the rock, say, with a hole so stove in her bow of a size which, after having been covered

by the canvas and the pump had been used—one pump had been used—which pumped the water nearly out of her, what, in your judgment, should have been done to have saved her?

A. Kept awake and looked out. I suppose the reason she sank she got sleepy after she got into the tow.

Q. After she struck the rock what could have been done?

A. Tore away her ceilings and stopped it up inside.

Q. In what way?

A. With any kind of bedding—mattresses, shores.

Q. How would you have stopped it?

A. Put a mattress over it and shore it down.

Q. In your judgment, would that have prevented her sinking?

A. I have done that same thing myself.

Q. In your judgment, it would have prevented her sinking?

A. Certainly, after they pumped her out once.

Q. In your opinion, could she have been beached at that place?

A. It could if she had the proper tools—small boat and lines.

Q. Suppose that while that tow was in motion and there had been a watch on the deck of the boat, how long would it have taken a person and watch to have discovered the break in the tow?

A. If he discovered when he was breaking adrift he must begin to look out for himself.

Q. How soon would it have taken a competent person and watch to have discovered such a thing?

203 A. Soon as the boats begin to throw themselves out of shape they discover at once they were adrift—break on the port side and drift on the east shore.

Q. Would not the lights on the tow show whether she was out of shape from the steamboat?

A. Yes, sir.

Q. And to a person on watch on the barge would the lights upon the steamer indicate the breaking of the tow?

A. They would know by the lines of the steamer they were out of shape.

Q. State what experience you have had in emergencies there about that place?

A. I went around there a great many times.

Q. Ever anchored there?

A. Yes, sir.

Q. How many times?

A. I could not tell you; a good many times during my lifetime with sailing vessels.

Q. Any difficulty in anchoring there, in your opinion?

A. There is no difficulty in anchoring there on that location because the water is not so deep, but there is holding ground; 5 or 7 fathoms of water there at Boathouse point on that side of the river, but on the West Point side the water is pretty deep—30 fathom.

Q. Are there any rocks in the river between Boathouse point and Garrison's?

A. Not that I know of.

Q. Suppose the accident was 400 feet north of Garrison's or 600 feet south of Boathouse point, would there be any difficulty in anchoring there?

A. No, sir; I guess not; there is a good anchor bed.

The COURT: Good anchorage between Boathouse point and Garrison's?

A. Yes, sir.

The COURT: All the way?

A. Yes, sir.

The COURT: The water was what?

A. Five to seven fathoms.

The COURT: What kind of bottom?

A. Soft bottom.

The COURT: Showing chart.

A. On the chart it was marked 5 to 7 fathoms; from Boathouse point 30 fathoms; that chart is not a very large scale; Boathouse point there; a man has not often right to contradict a chart, but I must contradict that one. I have been ashore there with a sloop.

204 The COURT: Between Boathouse point and Garrison's he could have anchored there anywhere?

A. Yes, sir.

Cross-examination.

By Mr. ANDREWS:

Q. What knowledge did you have about the Lee; what was the extent of it?

A. I did not know much about her, only I know she was built, when she was built new, who owned her and built, and what business she was in.

Q. You recollect of testifying on a former occasion in this case to $1,500?

A. I don't know but what I might; it is a good while ago. I never expected to come here again.

Q. I know you come here at great inconvenience. What particular business are you in now?

A. I have been looking up sunken boilers for the last two or three weeks.

Q. With a tug that you owned?

A. Yes, sir.

Q. Do you run her personally?

A. Yes, sir.

Q. You are not captain of her?

A. Yes, sir; I was before she got sunk.

Q. She has been sunk?

A. Yes, sir.

Q. Then you have not got any tug now?

A. Yes, sir; I have got a piece of one; she is lying on the dry dock.

Q. You have been in the tug business in the harbor of N. Y. how long?

A. 24 or 25 years.

Q. And rather often have been accustomed to be employed by the Schuyler line?

A. Yes, sir. I used to wait on their tows on that end of the route before they discharged me.

Q. Did they discharge you?

A. They did not want me any longer; that was 4 or 5 years ago.

Q. Then I suppose your course would have been, as soon as the tow was discovered to be apart, to have set this barge loose from the rest of the tow and drop anchor?

A. Yes, sir.

Q. Then you would have had the next one to do something?

A. If they had any anchors aboard.

Q. You would have had all the barges there done the same thing?

A. Yes, sir.

205 Q. After the other vessels, if they could have anchored had them all anchored?

A. Generally do when they get adrift that way.

Q. And the whole of these 30 or 40 boats that was in this detached portion exercised bad judgment—if they do not if they had the means?

A. They did not have the means.

Q. What would you have those do that did not have any anchor?

A. Those do not go by the anchors; they go by the insurance company.

Q. Why would not that be a good plan for the barges?

A. It is in some instances; sometimes they forget to get policies out. I forgot it on my case about $5,000.

Q. You think it is a good judgment if a hole is knocked in the bottom of the vessel — stop it with canvas if it can be done?

A. Yes, sir.

Q. It is good judgment, when you find the canvas not answering the purpose, to try to stop the hole from the inside?

A. Yes, sir.

Redirect examination.

By Mr. FROTHINGHAM:

Q. In your opinion, was it bad judgment not to fasten this pillow in the hole?

A. It won't stay unless you shore it down.

Q. You do not belong to the "bread-and-butter brigade"?

A. Yes, sir.

Recross-examination.

By Mr. ANDREWS:

Q. You are supported down to the Worth house by the Schuyler line?

A. I suppose so. I have not paid a cent.

Redirect examination.

By Judge MCCLELLAN:

Q. After the canvas was on and that operating so it pumped
206 the boat dry, if it got off by ordinary travel, being in a tow, would it indicate that good judgment had been exercised in fastening that canvas?

A. It would indicate that there had been carelessness on the part of somebody.

Recess.

THURSDAY MORNING SESSION, 9.30.

Mr. FROTHINGHAM examines the witness FOOTE further:

Q. In your opinion is a barge properly equipped without a small boat?

A. No, sir.

Q. Is the steamer America the boat engaged in towing on the Hudson river?

A. Yes, sir.

Q. She is in the habit of carrying how many boats?

A. I have seen her have 90-odd on her.

Q. On one occasion, when she was proceeding up or down the river with a large number of boats in tow, do you recollect a storm arising?

Objected to by plaintiff's counsel; not prepared to try that steamboat; no notice in the pleadings.

DEFENDANT'S COUNSEL: We want to show that the storm arose and broke up the boats, and what was done under the circumstances.

The COURT: I doubt very much the propriety of proving a single occurrence any more than you could prove a single occurrence in a lawyer's life for the purpose of impeaching his character. I think you can prove generally what has been done.

Defendant excepts.

Q. Have you known instances where anchors have saved these boats that are being towed?

Objected to as improper; calling for particulars and specifications we are not prepared to enter into. Objection overruled. Exception by defendant's counsel.

A. Yes, sir.

Q. How many boats, in your judgment, have you known of being saved in that way?

Same objection by plaintiff.

The COURT: I think that widens it out. I think the general effect is all you can go into.

207 PLAINTIFF'S COUNSEL: I will withdraw my objection.

WITNESS: I don't know; I remember one occasion where the America broke her whole tow-boat.

Q. How many boats do you know of having been saved in that way?

A. There was over 20 barges that might have got saved by their anchors; let go their anchors.

The COURT: What kind of boats?

A. Mostly all barges; the first trip up in the spring.

The COURT: Where was this occasion?

A. Right off Piermont, where the tow broke adrift; the tow broke entirely. The capt. came to N. Y. I picked that tow myself the night before. I went in to Christy street and went to bed.

Objected to by plaintiff's counsel as not proper.

The COURT: I don't think that is proper. I think it is proper to prove by this witness that the breaking up of the tow is not a frequent occurrence that happens. When you get to a particular occurrence or details it makes a very wide field of inquiry.

The COURT: Do you know of its breaking up—that frequent or unfrequent?

A. It is not so very frequent, but they do in gales of wind break up.

The COURT: It is something liable to occur?

A. Yes, sir.

The COURT: Your opinion is having good men on board, because it is liable to happen?

A. Yes, sir.

The COURT: When it does happen they want to be on hand to take care of the boats?

A. Yes, sir.

The COURT: That is the general proposition?

A. Yes, sir.

The COURT: We all know that anchors are put upon the boat for the purpose of stopping the boat where she is and prevent it from going ashore, and the fact upon a certain occasion anchors saved a vessel is nothing more than that we all knew before. The point of this case is whether the anchors thrown overboard at this place or point it would have saved this boat?

208 Recross-examination.

By Mr. ANDREWS:

Q. I understand you to be positive in your statement that the anchors saved the boats?

A. Yes, sir.
Q. You was there and saw it?
A. I was there, and saw them anchor all along the river. I was there, and helped pick them up.
Q. What was your occupation at that time?
A. Picking up tows.
Q. With what?
A. S. A. Steven's tug-boat.
Q. You was there when it happened?
A. No.
Q. You don't know anything about it; you was not there when the occurrence took place?
A. No, sir.
Q. And still you swear positive that the heft of the anchors saved the vessel?
A. I do.

Redirect examination.

By Mr. FROTHINGHAM:

Q. You picked up this tow in New York?
A. Yes, sir.
Q. Afterward picked it up at this place?
A. Yes, sir.
Q. How soon after you was there?
A. I got done picking them up at 12 o'clock, and then I picked them up that next morning again.
Q. And these barges were anchored when you picked them up?
A. Yes, sir.
The COURT: What would the fact indicate that beside the line of one boat breaking a good many lines snapped in a tow; at the time when this one line of this tow broke it was immediately followed by the snapping of a number of other lines? Is that a usual or unusual occurrence?
A. That is usual occurrence. That line breaking there, the heft of the boat — on the next-door neighbor, and his lines broke and let his still more weight on the next one, and so they go; one breaks the other.
The COURT: What would be the ordinary set of the tide with the drift of a boat on that point—West Point; ebb tide it was said to have been; what would have been the speed?
209 A. The tide sets to the eastward there; a single boat—I don't know as she would stay there.
Q. The COURT: What would be the speed? How fast would they move down?
A. I don't think over two miles an hour. Hell Gate tide runs four miles an hour; North river two miles an hour.
The COURT: About how long would it take them to loosen the ropes on a boat to throw an anchor overboard?
A. If they were on deck and had a watch ready and discovered when they were breaking adrift that would make some considerable

difference in the time. They might not get the anchor overboard in a few minutes. You see a barge has lines when they are fast to a canal-boat; the rings put into and put bents in them; they are fastened on the barge's bit. When you are in a hurry you need not wait for the lines to be cast off.

The COURT: Do you think, if these boats were ordinarily equipped for loosening the boat, they could throw the anchor overboard in two minutes?

A. Yes, sir; I could do that, when I was barging, in less than two minutes.

The COURT: Is it usual for these boats to carry anchors?

A. Yes, sir.

The COURT: Lee a barge or canal-boat?

A. Barge; what you call a small barge.

LEVI L. DE NOYELLES recalled for defence.

Examined by Mr. FROTHINGHAM:

Q. In your opinion is a barge properly equipped without a small boat?

A. No, sir.

Q. Is it a common occurrence for boats to break loose in these tows?

A. It is very often done.

CHARLES NELSON recalled by defence.

Judge MCLELLAN:

Q. When you was on examination as a witness for the plaintiff just as you stopped there was a partial interruption of a statement that I did not understand, and that was in reference to the
210 question which was put to you upon the fact of the tide, of a single boat being detached when rounding West Point; the fact of the tide against it; and whether, in your judgment, cut loose a single boat had come up against the east side of the river bank. You answered partially the question at the same time to explain, which was not completed.

Objection to this part of the statement which the counsel makes. Overruled. Plaintiff's counsel excepts.

Q. The difference between the action of the tide upon a number of barges that acts together and a single one.

The COURT: What is the difference between the effect upon a number of boats together or a single boat of the drift of the tide toward the east shore?

A. A good deal of difference.

Q. What is it?

A. Because the drift sideways, the through tide, has a pressure on the west side of that body—a number of boats attached together and pressing on the shore—whereas a single boat alone drifts from the through tide into the eddy like; that throws it off shore again; kind of stops, and going certain distance from shore it stops, and

that eddy, and following that tide down along a certain distance from shore.

The COURT: With a set of the tide to the east of an ebb tide is not all the way close up to the shore?

A. No, sir.

The COURT: That it goes toward the shore and then towards the west again?

A. Yes, sir.

The COURT: Whereas there is a number of boats together; when the first boat had gone as far as the tide drifts toward the east shore the westerly boats would not have got so far and would still keep busy pushing her over towards the shore; that is your meaning?

A. Yes, sir; that is my meaning.

211 Q. What would be the difference upon the boat that went against or on a rock, floating by the side of the shore, going upon a rock, whether that boat was in the tow or was detached from the tow when it hit?

A. A considerable difference.

The COURT: What would be the difference?

A. The boat alone is only her own heft; whereas — she is attached to one or two boats or more, why, that number of boats pulling on her, if she is behind them of that heft, if she st-ikes the shore, pulls her so much further on this point where she hit.

Q. Taking into consideration the fact of a barge alone was approaching the shore, drifting alone, if it could or did overcome the resistance it received from the current that ran along the shore, would, in your judgment, the concussion upon the rock or shore, say, of a single boat be strong enough to break it?

A. No, sir; not on the tide alone.

Q. Such a night as this was?

A. Yes, sir.

Q. It would not then?

A. No, sir.

Q. So that, in your judgment, if that boat had been detached from the tow in any decent sea, it would not have struck the rock hard enough to have made a leak?

A. No, sir.

Q. If these ropes had broken below Boathouse point four or six hundred feet, was there any difficulty, in your judgment, in detaching this boat from the tow and letting her go singly?

A. Yes, sir.

Q. Was that a good and proper place for anchorage?

A. Yes, sir.

Q. The question was not asked you—this line that you discovered; this dark-colored line that was broken on the night of this accident—whereabouts in the line was it broken in connection with the boat?

A. I should judge, the way I found, it was broke right across her stern or rail.

Q. Was it worn?

Objected to; leading question.

The COURT: What was the condition of the rope?

A. It looked as though it was kind of jagged or cut—shorn.

212 Q. With reference to its having been broken or not by chafing, how was it in appearance as to that? You have seen ropes that were chafed off—broke off by rubbing?

A. Yes, sir.

Q. How was this rope in appearance?

A. It looks like a rope chafed off, or cut in that way.

Q. And where you think it had broken off was or was not that the place where it would have chafed off at all?

A. Yes, sir.

Q. Do you recollect whether the boat itself showed or had the appearance and the probable evidences of being suitable for chafing?

(Not answered.)

Q. Whether in this place there was anything that would show that the boat was adapted and would chafe the rope if it had been placed there.

A. On the boat?

Q. Yes, sir.

A. Why, certainly.

Cross-examination.

By Mr. ANDREWS:

Q. You were a witness subpœnaed here by Captain Salisbury, the plaintiff?

A. Yes, sir.

Q. And you are supported here by the Schuyler line, are you not, at the Worth house?

A. Yes, sir. They pay my board; I have not.

Q. They notified you to go there and live with them?

A. No, sir.

Q. How did you come to go there?

A. Because I was in the habit of going there before.

Q. You expected them to pay your board there?

A. I did not.

Q. Do you expect them to pay your board there?

A. No, sir.

Q. Did you board there the last time?

A. I did.

Q. Did you pay your board yourself?

A. No, sir.

Q. Who paid it?

A. Schuyler folks.

Q. You swear now you don't expect your board will be paid by them this time?

A. No, sir; I do not.

Q. You have seen Captain Craig there—captain of the Niagara at the time of the accident?

A. Yes, sir; he was in the hotel the other day.

213 Q. You have seen him there several days?

A. No, sir.

Q. You have talked with him?

A. Yes, sir.

Q. Are you able to remember whether or not the hawser was sprung the night of this accident?

A. No, sir.

Q. Have not you talked with Craig about it?

A. No, sir.

Q. Why did not you?

Objected to as improper and immaterial.

The COURT: I think so far it relates to the mental emotions of the witness. I don't think it is proper why he did not ask the captain of the boat a certain question.

Q. Have you talked with him since the accident about the springing of the hawser—since that time?

A. No, sir.

Q. What do you say now after the reflecting time as to whether the hawser was sprung in passing West Point at that time?

A. I don't recollect.

Q. You have sworn when you was examined last January—you then swore you thought that it was not sprung.

A. I don't recollect what I did.

Q. Did you swear then that the lines of this boat that broke loose first or one of the lines was an old rotten line?

A. I think it looked like an old line; yes, sir.

Q. Did you swear one of them was an old rotten line?

A. I don't recollect what I swore to.

Q. Did you say anything then about the line having been chafed off?

A. I don't know whether I did or not.

Q. Did you ever mention the word "chafe" in connection with the breaking of that line until I asked you a day or two ago on the stand what you thought caused the line to break?

A. I don't know whether I did or not.

Q. Did you swear on the former trial that if the line had not been rotten the boat would not have broken loose, in your opinion?

A. I don't know whether I did or not.

Q. Have you tried to find out whether the hawser was sprung that night or not?

A. No, sir.

Q. Have not you inquired of anybody?

A. No, sir.

Q. Why did not you?

A. Because I don't think it was necessary.

214 Q. Was not it because you did not want to hear it; wasn't that it?

A. I don't know about that.

Q. Although you were subpœnaed by Captain Salisbury in this

case, your chief associations in the city of Hudson have been with this Schuyler crew?

A. They are the only people I know; common for a man to go among acquaintances and not among strangers.

Q. Have you told Captain Salisbury this week that the Schuyler folks paid your board at the Worth house?

A. I don't know if I did or not.

Q. And last week?

A. I don't recollect of doing it.

Q. How is your memory?

A. Very poor sometimes.

Redirect examination.

By Judge McClellan:

Q. You were subpœnaed by the defendants?

A. Yes, sir.

Q. And your fees paid?

A. Yes, sir.

Recross-examination.

By Mr. Andrews:

Q. Did Captain Salisbury offer to board you?

A. He gave me a half dollar every day.

Q. Did he offer to take you up to a hotel and board you with his witnesses?

A. He asked me one day to give me dinner.

Q. Is that all he did?

A. Yes, sir.

Q. How much did you say he gave you a day?

A. Last week he gave me a half dollar every day.

Q. Have not said anything to him about boarding you?

A. No, sir.

Harvey Temple sworn for defence.

Examined by Mr. McClellan:

I reside in the city of Albany.

Q. What is your business?

A. Steamboating.

Q. How long have you been engaged in boating business?

A. About 42 years.

215 Q. And in what different capacities have you been?

A. From a cabin boy up to the captain of a steamboat and all the branches.

Q. How many years have you been captain of a steamboat?

A. About 16 years.

Q. And where has been your experience in boating?

A. On the Hudson river from Troy to New York.

Q. And engaged in towing some of that time?

A. Yes, sir

Q. Or all the time?

A. About 32 years in the towing business.

Q. Are you acquainted with the tides and localities along the river in the vicinity of West Point?

A. Yes, sir.

Q. And the facilities for anchoring along there?

A. Yes, sir.

Q. You are acquainted with the steamer Niagara?

A. Yes, sir; I have been captain of her.

Q. That boat with the tow of 50 boats—was she at all overloaded? Was it a light or large tow for her?

A. An average tow.

Q. In passing around West Point—a line should break in passing around West Point, and the back end of the tow, perhaps more than half of it, was detached from the front end—if it was left to itself there breaking, when it was going around West Point, where would the detached part of that tow go to?

A. Just above Boathouse point.

Q. Above the Boathouse point what is the condition of the shore there?

A. It is mud flat.

Q. Under those circumstances would there be any danger of that portion of the tow being sunk?

A. No, sir; I should think not.

Q. Now, supposing that that same tow should break below Boathouse point or at Boathouse point four to 600 feet, and then what would be the direction of this detached part of the tow?

A. That would depend upon the position the tow was in.

216 Q. Suppose the tow was in its ordinary place?

A. It would drift to Garrison's, more to the eastward than it would to the westward, in an ordinary position.

Q. Any point from Boathouse point down?

A. Yes, sir.

Q. Going back to the first position in rounding West Point this tow should become detached as I have said, what does ordinary prudence require in the management of a boat in that tow of the barge Lee circumstanced as the barge would have been?

A. Detach lines and let his anchor go; take care himself; cast his lines off and look after his own barge.

Q. And what would the same circumstances require if below West Point, along Boathouse point and below there, between there and Garrison's; what, then, ought to be done?

A. Same condition; apply the same rule.

Q. Have you had any experience in anchoring along Boathouse point to West Point and down around there?

A. I have anchored out probably three or 400 feet below the point.

Q. Good anchorage ground?

A. Yes, sir.

Q. You have seen boats anchored there?

A. Yes, sir; I have taken a schooner away from there.

Q. You are acquainted with the anchorage ground along there?
A. Yes, sir; it is all muddy bottom.
Q. Is that called good or bad?
A. What we call good holding ground?
Q. Supposing the parties did not anchor for any reason in the world; aside from anchoring, what would ordinary prudence require for the men in charge of that boat to save the boat to do?
A. Take a small boat and line, attach it to the barge, and commence pulling her down the river.
Q. In your experience is that a perfectly feasible plan?
A. Yes, sir; vessels do that.
Q. Larger boats than the Lee is?
A. Yes, sir; big schooner.
Q. Suppose that fact was omitted for any cause, that would apply in either position?
A. Yes, sir.
217 Q. Suppose that act was omitted for any cause, what, when the boat did go upon the rocks, still attached to the tow, and a hole was broken in her, a canvas was put over her, the hole around the bow over the whole the boat was leaking, when that was done, after that canvas was on, while the boat was still attached in the tow, the boat then off the rocks floating down, one pump was sufficient to pump the water out so that they could see and go down and see and examine and canvas this hole—what would ordinary prudence require under such circumstances?
A. If you had any bed clothes aboard the vessel——
Q. But — the bed clothes if that canvas was sufficient to do that?
A. I should go down and examine the hole and see where my leak was, and then I found there was a hole there I should apply anything that I could get hold of—pillows or comforters; if I had not that, I would take my coat off, slam it down there, and wedge it down; took a piece of board and — against the bottom; that would hold it there.
Q. How is the fact of this break? Was there a break that had sprung up and broken the plank—would it spring up to let in the water? How is the fact, whether or not that remedy would not have effectually stopped it?
A. It would stop it; shove these splinters that worked up, and shove them back by this wedge.
Q. In your judgment was there any difficulty in saving the whole of the vessel if either of the courses had been pursued under either of these situations?
A. I think not.
Q. You have seen the barge Lee?
A. Yes, sir.
Q. You know about her size?
A. Nothing more than looking at her.
Q. In your experience how many men ought to be on a barge of that size?
A. Ought to be three men at least.
Q. Under circumstances like these—barge of the size of the Lee,

captain absent from it, no one in charge of the Lee, loaded with
250 or 260 odd tons of brick, no one in charge of her but a
218 young man engaged as cook, who had never made a voyage
as hand upon a boat except from New Baltimore to the place of this accident at West Point or a little below on this occasion, and a young man who had never been employed upon a boat upon the river or any other river except to make one trip, and his employ not having exceeded four weeks, his whole work upon the river not to exceed four weeks, although under 21 years old—would such a boat have been sufficient manned for that voyage down to New York?

A. No, sir.

Q. A barge of that character need and require a small boat?

A. Yes, sir.

Q. With its anchor and appurtenances?

A. Yes, sir.

Q. Is it occurrences that often happen—the breaking apart of tows?

A. Yes, sir.

Q. And upon what occurrences upon this voyage and trip—what happenings require the use of the anchor on such barges?

A. In case the steamboat breaks down or the tow breaks up or anything of the kind; in case of a blow.

Q. Every disarrangement?

A. Yes, sir; everything connected with it.

Cross-examination.

By Mr. CADY:

Q. You say you have been navigating the Hudson how long?

A. Even since I was ten or twelve years old.

Q. How long have you been in the command of a tow-boat?

A. I have been about 32 years pilot and captain; about half the time pilot, the other half captain.

Q. Prior to that time did you have any experience on boats in tows being towed up and down the river?

A. No, sir.

Q. Were you ever on a barge—in charge of a barge—in a tow?

A. No, sir.

Q. You, of course, never were on a barge that broke loose on the part of the tow in going around West Point?

A. No, sir.

219 Is not it a very difficult thing to take a tow around West Point?

A. Not if you know your business it is not.

Q. Did you ever take a tow around West Point safely?

A. I have taken a great many around there safely; never had anything but safety.

Q. You always been careful at West Point?

A. Always.

Q. And have therefore always gone around West Point in safety?

A. All around in safety.

Q. Have not you taken some large tows around West Point in safety?

A. Yes, sir; I have taken 99 boats around West Point both ways.

Q. Keeping good management of the tow around in safety?

A. On an ebb tide; the 99 boats was on a flood tide.

Q. The Niagara is a large boat?

A. Yes, sir.

Q. You say that this tow of 50 or 60 boats was not a large tow for the Niagara?

A. No, sir; ordinary tow.

Q. Then is not it your opinion that if the Niagara and her tow had been properly managed she might have gone around West Point in safety?

A. Yes, sir.

Q. And if properly managed and having gone around West Point in safety would her tow strike upon the rocks at Boathouse point?

A. No, sir; they would not have.

Q. In going around West Point what is the proper position for the boat or steamboat as to bring toward the east or west shore? Which shore should she be nearest?

A. The course for an ebb tide for a boat coming around West Point—they come around with a circle, right around on the corner, going right around in that direction. As soon as the head tier of the tow opposite comes to end off West Point—a large tow—the steamer then heads for Garrison's directly.

Q. And if the tow is in a proper position, and goes around West Point al- right, ought not the steamboat to keep a southeasterly course—that is, the course towards Garrison's—until she goes below Boathouse point?

A. She has got to be up to West Point, and when the turns
220 she turns a circle, and the minute she turns that circle the tow comes out after the head tier shows itself outside of West Point to already go for Garrison's.

Q. That would be rather a southeasterly course?

A. Yes, sir.

Q. Would the steamer hold on that course until she got down about opposite Garrison's?

A. No; she would change—change to about south before you pull for Garrison's; she would pull towards Garrison's, and the minute that the tow begins to come to easterly swing, then we straighten.

Q. Would it be a proper position for a steamboat whose tow had come around West Point properly when the steamboat got to a point opposite Boathouse point to be headed to the west?

A. No, sir.

Q. Should she be headed to the west at any time before she got to Garrison's, assume that her tow came around properly?

A. There is no west.

Q. After the steamboat comes around West Point which shore should she be nearest to?

A. The best of the east shore.

Q. Where should the tow be?

A. Right following the steamboat down.

Q. How far to the east shore should they be?

A. They should be a third off the east shore; two-thirds of the river to the westward of her.

Q. Should the tow ever be in a position as it went to the east shore that a man could jump from the boats to the rocks? Is that a proper position?

A. No; I do not approve of that at all.

Q. And should the head of the tow—the head tier of boats—ever be in such a position in a properly managed tow that they are within 100 feet of the rocks, the tide being an ebb tide, the rocks on the east shore?

A. Yes, sir; it is not a proper position; I do not like it; they go down through there.

Q. They might go through?

A. Yes, sir.

Q. Is not the fact when it is going in such a position it is usually because they are driven off the west shore—meeting another
221 boat—something of that kind?

A. We take our place.

Q. Is not usually the case some obstructions in going around there when the tow goes so near the shore?

A. We do not turn out so much.

Q. Why, what you could do?

A. These vessels understand when we are coming there.

Q. Why is it you ever go so near to the east shore?

A. It may be a vessel without any wind.

Q. It is because there is some obstruction?

A. Yes, sir.

The COURT: Some obstruction or mismanagement?

A. The wind going down catch on them with a line; sometimes get them on top of the hawsers to go right on with them.

Q. When a steamboat undertakes to turn her tow she usually changes her own course?

A. Yes, sir.

Q. What is the tendency of that change of course on the tow? Is it not to bring the tow in a circle or semi-circle?

A. Yes, sir.

Q. It has a tendency to bring a strain on the outside line of this circle?

A. If you turn that particular circle at that moment; but if the body of the tow is going in an opposite direction it loosens these boats up on one side.

Q. On the outside of the circle?

A. It brings the strain of the outside line of the circle. It is a strain, but more strain on the outside.

Q. It lets up on the inside?

A. Yes, sir.

Q. You have never been on a barge that broke loose off West Point. Suppose you found yourself—you being on the port side of the tail of the tow—so near the rocks of Boathouse point that you could jump ashore, being on an ebb tide and you being attached to the tail of this tow, what would you do?

A. Throw that anchor right overboard. That would be the first thing I would do.

Q. Do you think it would hold?

A. I should do it anyway. She was within 50 feet of the shore, my anchor would go over.

222 Q. What would be the effect on your boat by throwing it overboard?

A. The minute it reached the bottom, if it is ebb tide, if the barge was sagging down, if she was 50 feet from the shore, if the tide had her on her west side as she would swing to the shore, it would ease that barge. All she would get would be the natural pressure of the tide. If the tide got her on the east side and carried her the other way she would swing right around.

Q. But when the tide is ebb it strikes the boat on the west side?

A. Yes, sir.

Q. You say the tendency would be to push the boat against the shore?

A. Yes, sir; her stern would strike the shore.

Q. So that anchoring at this point would not necessarily prevent the boat from striking the rocks?

A. No, sir; she would swing against the rocks or shore.

The COURT: Do you know about how many boats there were in this tow?

A. Nothing more than the statement.

The COURT: It has been testified to there was 45 or 50. In rounding West Point with the tow with the Niagara at this time, described as an ordinary night—no particular blow—where would you expect—what point would you expect—if there was a line that broke what point would the steamer be apt — be?

—. ——.

The COURT: Suppose this line broke.

A. The tow or the steamer?

The COURT: It was a line in the tow.

A. I should say if that line broke as the tow had turned West Point—turning the West Point—I should say that the strain would be on the west side of that tow. It must certainly double up on the west side.

The COURT: If it took the proper course?

A. Yes, sir.

The COURT: This broke on the east side.

A. I can't see how that line would break on the east side; it could not hit Boathouse point; it is out of the question. The

223 statement I listened to in this room is all I know in regard to these facts. That barge never hit Boathouse point.

The COURT: Where did it strike?

A. It has been down along by Garrison's, because the captain found the tow below Garrison's. He certainly must have drifted down to Garrison's, in my experience as a navigator, after that tow passed West Point. The tow comes around West Point and it begins to come to the westward, because the steamboat has pulled on the east hawsers. This tow is taking a circle—the way to the tail end, which takes a circle to the eastward. I said, in regard to the tide setting above Boathouse point, it sets right in above the Boathouse point. There is no question about that. I have seen vessels laying there, but when you come to Boathouse point the tide begins to set off.

The COURT: Have you located in your mind from the description of this hawser where this line broke?

A. Yes, sir.

The COURT: Where?

A. That steamer that went up and blowed those whistles astern the steamboat Niagara—that the very swells of that boat was what caused that trouble. She blowed her whistle at the tail end of the tow.

Q. You are mistaken about where the vessel blew her whistle. Suppose a pilot and captain of a boat had taken their tow around West Point in such a way that their tow was going too near the rocks on the east shore, what would they do to keep from striking the east shore—the tow?

A. Heave hard starboard on the wheel and head your steamboat right to the eastward as fast as you can.

Q. Would it be proper if a captain and pilot found their tow in a dangerous condition off Boathouse point to head their steamboat to the west?

A. No, sir; to the east.

Q. That would be improper management?

A. Yes, sir.

Q. If that should be that it would bring the tow in a semicircle?

A. Yes, sir.

Q. And bring the strain on the outside lines?

A. After the tow had done the spring.

224 Q. Suppose a steamboat starts to the west, that brings the head tier of boats around to the west after she has begun to pull on her hawser?

A. Yes, sir.

Q. And it brings the strain—assuming the rest of the tow to be straight, the steamboat heads to the west and brings the head tier to the west; that brings a strain on the hawsers on the east side?

A. Yes, sir.

Redirect examination.

By Judge MCCLELLAN:

Q. These questions that have been asked to you in regard to the proper position of the steamboat—at the time you answered them with reference to the tow complete, did you not?

A. Yes, sir.

Q. They had no reference to the tow detached?

A. No.

Q. I understand you to say, in coming around West Point with the tow complete, when it got around, or got your boat or head of the boat, or the head of the tow had got around West Point, that the pressure on the east line would be relieved?

A. Yes, sir.

Q. On the east side of the tow-line?

A. Yes, sir; it has got to be relieved.

Q. What relieves it?

A. The tow going round in a circle; the same principle that turned these tows, 50 or 60 boats, in 500 and 600 feet. We shove them up together in the circle—twist them right around.

Q. Is there any danger of going within a hundred feet of this east shore along there from Boathouse down to Garrison's?

A. No.

Q. How near that shore is a perfectly safe distance for a tow to go down, ebb tide?

A. Go 50 to 60 feet.

Q. It is a perfectly safe distance?

A. Yes, sir.

The COURT: That is, — everything goes all right?

A. Yes, sir; we have been there as close as that many times; we can't avoid.

Q. Your belief is here with that tow did not break going around West Point?

A. Yes, sir; I don't think it ever broke going round West Point.

225 Q. Then if this is the case, then there was nothing prior to that time that would indicate to you any mismanagement on the part of the boat?

A. No, sir.

Q. If it was going down there all right within 100 feet of the east shore, the tail end of that tow or the tow itself within 100 feet of the east shore, would there be anything in the management of the boat in allowing the tow to be that near the shore—show anything in regard to indicating the mismanagement of it?

A. No, sir.

Q. Not at all?

A. Not at all.

Q. You say to pull the tow, the tail end of the tow, if it had swung toward the east shore more than you desired, pulling the tail end of the tow away from that shore, you would steer your vessel to the port or east side?

A. Yes, sir; straighten her right down the river.

Q. You naval gentlemen in talking about such things would call that pulling it off the east shore?

A. Yes, sir.

Q. From your experience along that river from Boathouse point down to Garrisons, are there any rocks in that river?

A. O, no; shore. That is all; nothing but the shore rocks.
Q. I understood you to say a muddy bottom.
A. Yes, sir.
Q. Good anchoring ground?
A. Yes, sir.
Q. A boat striking there, adrift or anywise, against that east shore, between Boathouse point and Garrisons, could it have struck anything but the rock of the shore?
A. No; the shore is right up and down.
Q. In your judgment and from your knowledge of that locality, would it have been possible to run a boat on a rock?
A. No, sir.
Q. It must have gone simply against the rock?
A. Yes, sir.
Q. From your experience and your knowledge of navigation and acquaintance with towing and its requisites upon this Hudson river and in that locality, could, under any circumstances, the management of the boat prevent the breaking of lines that attached the tow-boats together?
A. No, sir.
226 Q. And from your experience are lines that attach the boats one to another in a tow—breaking of them a matter of frequent occurrence?
A. Very often.
Q. And from your experience does the rubbing and chafing of the line upon boats or parts of boats frequently produce that thing?
A. I have seen cases of that kind myself.
Q. If a line connecting the tow-boats together had become chafed and should break in turning West Point or any other place, would you regard it as any evidence or as being the cause of the mismanagement of the steamer?
A. No, sir.

Recross-examination:

By Mr. CADY:

Q. You are in the employ of the Schuyler line?
A. Yes, sir.
Q. How long in their employ?
A. Off and on 32 years.

CHARLES NELSON recalled for cross-examination.

Mr. CADY:

Q. When you went back to that broken part of the tow that night did you find any boats in the tow anchored?
A. No, sir.
Q. How many boats were there in that broken part of the tow?
A. I don't recollect how many there was. There must have been in the neighborhood of 33 or 34 boats; 36 or 37.
Q. Do you know whether the captains of any of those boats were on them, to your knowledge?

A. Yes, sir.
Q. And had any of those captains cast anchor?
A. No, sir.

Redirect examination:

By Judge McCLELLAN:

Q. What remark did you make last?
A. My remark—I don't believe he had not.
The COURT: Had not what?
A. Anchors.
227 The COURT: That is, on the 36 or 37 boats this was the only one that had an anchor?
A. I could not swear to that.
The COURT: You don't believe they had any?
A. The majority hadn't any.
Q. They were almost all canal-boats?
A. Yes, sir.

Recross-examination.

By Mr. CADY:

Q. Do you know whether they had anchors or not?
A. I do.
Q. How many of them?
A. I could not tell how many.
Q. Those boats — had anchors had not cast anchor?
A. No, sir.

Redirect examination.

By Judge McCLELLAN:

Q. The majority of canal-boats do not carry anchors?
A. No, sir.
Q. And the majority of the boats in this tow were canal-boats?
A. Yes, sir; great majority of them.
The COURT: How is it with these tows—do they carry anchors, square barges like that?
A. Yes, sir.
The COURT: Do they sometimes go without them?
A. No, sir.
The COURT: Were there any barges other than that in this tow?
A. None in that back row.
The COURT: Not one?
A. No, sir.
The COURT: Was this the only barge in this tow?
A. We had two alongside, and this one makes three barges—all we had, I think.
The COURT: Do you know the name of those barges, the other two?
A. One was the Budlong.
The COURT: Do you know whether he had an anchor?

A. Yes, sir; two of them.
Q. Do you recollect the name of the other?
A. I do not.
Q. But they weren't in the hawser tow?
A. No, sir.
228 Q. Whereabouts was the boat, in your judgment, when you discovered that this tow had broken, or that she had broken—your steamboat Niagara?
A. My judgment she was about in the middle of the river; she might have been partly to the eastward of the middle of the river.
Q. With reference to the points on the river, Boathouse point or Garrison's, above or below Garrison's?
A. Above Garrison's, of course.
Q. The boat was when you discovered?
A. O, I understand now; the steamboat was just about abreast of the docks there by Garrison's.
Q. That is the way you went, and then you immediately turned around and went back?
A. Yes, sir.
Q. You think at that time she boat was nearer the east than the west side of the river?
A. Yes, sir.
Q. And for how long a time had you been sailing in the same direction prior to that time, and for how far?
A. I should judge about 4 or 5 boat-lengths from the steamboat; 200 fathoms, I should say.
Q. You had been sailing in the direction you was at that time?
A. Yes, sir.
Q. And how was the boat directed—more to the east or west shore of the river—the Niagara?
A. I could not exactly say; I thought she was about the middle of the river after they got straightened around West Point.
Q. She was not going towards the west shore at all?
A. No, sir.

Recross-examination.

By Mr. ANDREWS:

Q. Have you thought whether you sprung the hawser that night?
A. No, sir; I never thought nothing about it.

Mr. FROTHINGHAM: I will read the testimony of BENJ. WARFORD, page 106 to 108 of printed case:

Q. Where do you reside?
A. Tottenville, Staten island.
Q. What is and what has been your business?
A. Freighting and forwarding business.
229 Q. Been in the boating business?
A. Yes, sir.
Q. Been an extensive owner of barges?
A. Yes, sir.

Q. Did you and your partner formerly own the barge Lee?

A. My late partner built her—Captain Robinson. He owned a part of her.

Q. You were well acquainted with her?

A. Yes, sir.

Q. Well acquainted with the value of barges?

A. I am.

Q. And were in 1866?

A. Yes, sir.

Q. How old was she?

A. Built in 1853.

Q. Did you know of sales of barges about that time?

A. Yes, sir.

Q. What, in your opinion, was the fair market value of that barge?

A. $1,200 or $1,500. I think $1,500 was a good price for her.

Q. In the sale of a barge or vessel of that kind does her furniture always go with her?

A. Always included as a portion of the boat.

Q. Your estimate of the value is predicated upon the value of the barge and her furniture?

A. Yes, sir.

Cross-examined:

Q. What boats do you know of being sold in 1876?

A. I think we sold some ourselves and bought some that year. (Question repeated.)

A. I think the barge Moncrief was sold that year.

Q. Who sold it?

A. To the best of my belief, James Conde bought her. Lansing Barker sold her. I was told what price by the captain, and that's all I know about it. I know what he gave for the boat from what he told me.

Q. What kind of a boat was she?

A. Fair business boat; about 300 tons; trifle over.

Q. Three hundred tons of measurement or carrying capacity?

A. Carrying capacity?

Q. About what measurement?

A. Well, I presume about 148 tons, or somewhere along there.

Q. Adapted to what kind of business?

A. Freighting, etc.; river business.

230 Q. Shallow or deep water?

A. Either; drew about 8 feet loaded, I presume.

Q. Require 8 feet?

A. Yes, sir.

Q. Go to Troy easily?

A. Yes, sir; take high water to go up same as they usually do.

Q. Acquainted with the river navigation or more with the navigation about New York?

A. I commenced when I was nine years old at West Troy, and been connected with the river business since nine years old, except

two years in the army as a captain and lieutenant and the few years I have been in the New York office managing.

Q. Would a boat drawing 8 feet of water be well adapted to doing business at the upper end of the Hudson?

A. Yes, sir.

Q. Go to Schodack?

A. I am not so well posted at Schodack.

Q. Or Coeymans?

A. Yes, sir; I think so.

Q. And New Baltimore?

A. Yes; I think so.

Q. Get into Coeymans easy?

A. I am not so well acquainted there.

Q. Get into Stuyvesant easy?

A. In high water.

Q. If you had a barge drawing six feet wouldn't that be a more convenient boat to handle at the upper part of the Hudson?

A. Yes, sir.

Q. That would increase its value for doing business?

A. At some certain points.

Q. For the brick trade?

A. You can get a stronger boat by having a deeper-sided boat.

Q. For the brick trade wouldn't a boat drawing six feet be better adapted for doing business at the upper part of the Hudson river?

A. In shallow-water places it would.

Q. That would enhance her value?

A. At a certain point.

Q. When were you familiar with the Lee?

A. Since she was built.

Q. When had you last seen her?

A. I couldn't tell you exactly; some year or two, I presume.

Q. On board of her?

A. Not as I know of.

231 Q. Knew that she had been repaired extensively?

A. No, sir.

Q. You didn't know anything about that?

A. No more than usual repairs we put on our boats every two or three years. We have to keep them up.

By defendant's counsel:

Q. Has there been a great depreciation in the value of barges since 1873 and 1874?

A. Yes, sir.

Q. Do you know of the sale of the barge Hawley and Fuller in 1876?

A. Yes, sir. The sale of the Moncrief was from James Conde to Robinson instead of to Barker. Barker sold her in the first place.

By plaintiff's counsel:

Q. What was she sold for?

A. Barker sold her to Conde for $6,000 and Conde sold it to Rob-

inson at the rate of $2,700. That is within two or three years—in 1876.

Q. That was done in 1876 or since?

A. The last sale, I think, was in 1876.

Also reads in evidence the testimony of Jacob Van Schaick, page 110 and 111, printed case, to the effect that the barge was worth from $1,200 to $1,500.

Defense rests.

Plaintiff's Rebuttal.

Defendant objects to allowing plaintiff to offer further evidence in rebuttal of defendant's evidence tending to show absence of negligence on its part and contributory negligence on the part of the plaintiff.

The COURT: If she drifted against the rocks in consequence of the parting of a tow-line, that *prima facie* is negligence upon the part of the steamer; it must be accounted for. There has been some doubt expressed whether or not the steamboat is responsible for the lines which formed a part of the propelling force. If they are furnished by the owners of the barges, if there is any agreement between the owners of these different barges and the steamboat,
232 the parting of the line may raise the question as between the owners of the barge whose line parts from the steamboat, but as between vessels which tows and the vessel which is injured by reason of the parting of the line which is not its own I think, as between them, the line which hauls the mass of which mass the boat injured is a part, that the line breaking is to be deemed the line of the steamer. I think that follows from the fact that the boat is put into the tow for the purpose of being hauled to New York, and that which is a part of the machinery of hauling is a part of the machinery to be furnished by the boat. Surely the rope which is used for the purpose of hauling must be a part of that machine. Therefore I stated yesterday, in view of these arguments I have adduced, it would be sufficient in the first instance for the plaintiff to prove that *their* boat either was hauled or was compelled to drift against the rocks in consequence of the parting of a hawser, and thus call upon the defense to explain the cause. You have sought to explain the cause. You say you have taken all due and proper care. You have proved by Mr. Ableman, among other witnesses, that these tow-lines were all good lines when he inspected them previous to the making up of the tow. You have further proved by some witnesses, or at least given evidence tending to prove, that the cause of the breaking of the line was from the friction of the line against the pin. Upon that evidence you also ask the jury to infer or draw the inference there was no negligence on your part.

Now, the plaintiff, I suppose, wants to ascribe this to some other cause. Rather, he wants to put in evidence from which the jury may draw the inference that the cause of the breaking of the tow-line was not in accordance with your theory, but can be accounted

for on another theory—that is, upon the want of springing the hawser and making the turn. I therefore think it is strictly rebutting evidence.

In view of the fact that you have stopped suddenly, and
233 because I am quite satisfied the plaintiff is not at fault, in the absence of the witness at this particular juncture — to take our usual noon recess.

Exception by defendant's counsel.

Recess.

THURSDAY AFTERNOON SESSION, *April* 24—2.30.

PHILIP LANSING sworn for plaintiff.

Examined by Mr. ANDREWS:

Q. Where do you live?
A. Castleton.
Q. Have you been engaged in boating?
A. Yes, sir.
Q. How long?
A. Forty-odd years.
Q. What did you begin at and what have you followed?
A. I went cook on a sail vessel; that third hand, second hand, first hand, and then owner, and then captain.
Q. Have you sailed as an officer on steam tow-boats?
A. Yes, sir.
Q. Officer on what boat?
A. Officer and pilot, too; pilot of the Buffalo, Cayuga, Hero, Aimee, Eagle; several other ones. I have been captain of the Syracuse, captain to the Ohio; pilot on the steamboat Sandusky years ago.
Q. Branch of your employment upon a tow of boats between Albany and New York?
A. Yes, sir.
Q. You have been captain on one of those boats that tow between New York and Albany?
A. Yes, sir.
Q. Which boat was that?
A. On the "Ohio."
Q. Captain on any or any officer?
A. Captain of the Ohio and the Syracuse.
Q. Have you sailed around West Point with tows?
A. Yes, sir.
Q. As an officer?
A. Yes, sir; towing large rafts around there.
Q. Have you heard considerable of the evidence in this case?
A. I did; some; yes, sir.
Q. The turning of West Point by a tow-boat having a tow—is it a nice piece of business, somewhat?
A. Yes, sir; a man has got to understand his business.
234 Q. What would you think; you know the Niagara?

A. Yes, sir.
Q. Been upon her?
A. Yes, sir; been aboard of her.
Q. Have you been employed on her, ever?
A. Yes, sir.
Q. Assume the Niagara with a tow of 50 boats to have just rounded West Point and the tow to have been at the time within 100 feet of the opposite shore and the rocks at Boathouse point, it being an ebb tide and ordinary weather, pleasant weather, but in a dark night, what would you think of the safety of such a condition, having the tow of 50 boats?
A. It would be unsafe; I should think it would hit.

DEFENDANT'S COUNSEL: Objected to as incompetent. There is no proof that she was within 100 feet of Boathouse point.

The COURT: If this evidence does not apply, of course it has no force.

Exception by defendant's counsel.

Defendant's counsel also object to it as not responsive.

The COURT: I think it is responsive.

Exception by defendant's counsel.

Q. Was that such a condition of those boats of that tow as could have been avoided by a properly manned steamboat having them in tow—properly managed—the condition of the steamboat? The steamboat, I suppose, I assume, has rounded West Point, and the boats which she has in tow—having 50 boats in tow—are within 100 feet of Boathouse point. You say that would be unsafe condition?
A. What portion of that tow do you mean; front part or back part?
Q. Back part—the last half of it.
A. The last end of the tow was abreast at the point, she would clear; would not hit at all; 100 feet of it.
Q. Assume the front tier was within 100 feet.
A. Then she would be liable to hit the stern tier.
Q. Whether that was a condition that a skillful navigator could avoid—skillful navigator on a steamboat could have avoided.
A. I have alway avoided that.
235 Q. Could a skillful navigator avoid getting into such a condition as that?
A. If there was no vessel in the way.
Q. I am speaking if there was nothing in the way?
A. He could avoid that.
Q. How would he avoid that? Mention the different ways in which he would avoid getting in that condition.
A. After he had started right from Magazine point, kept his steamboat close to the westward, he could avoid in that way; but if the tow drifted over towards West Point he could not pull them towards Magazine point, then they would be close to the West Point; he would have to spring a hawser, if he had no other way to do, having no barge to make a rudder.

Q. Spring the hawser?

A. That is a line fastened on the hawser beyond the bits and taken up to the gangway chock—taken up as far as they could.

Q. Tell us about those bits.

A. They are posts with hawsers wound around them.

Q. Whereabouts?

A. On the stern of the boat, midships in the boat.

Q. They are on the starboard side?

A. In the middle as regards starboard, and port on the stern end.

Q. Assume the steamboat to be in this condition which I have said on having rounded West Point, and being in near somewhere in the neighborhood about the middle of the river, and the tow down within 100 feet of Boathouse point or in that vicinity, what would be your judgment as to the hawser having been sprung?

A. It looked to me as though the hawser had not been sprung or the steamboat would not have been there.

Q. What is the usual practice about springing the hawser at that place coming around West Point?

Objected to; usual practice is improper.

The COURT: I think that is proper.

Exception by defendant's counsel.

A. Sometimes they spring them; sometimes they don't.

Q. At ebb what is the usual practice—coming around West Point at ebb tide with a tow of 50 boats?

A. If she has no barges alongside of her to make a rudder
236 they usually spring, but if they have a barge alon-side they can answer the same purpose as springing the hawser.

Q. I will assume the steamer Niagara to have rounded West Point, and to have this steamer with its freight of 50 boats, barges, and canal-boats in tow, the steamer got along around West Point, and the tow down was near to the land between Boathouse point and Garrison's that a person could almost jump from the boat to the shore, what should you say, then, above Garrison's, whether under those circumstances the hawser had been sprung?

A. Why, I should think it had not been.

Q. What would you think, suppose there was barges on the side?

A. They have to be alon-side the steamboat.

Q. Suppose they were, what would that condition indicate; if there was a barge on the side and the tow was down near enough to the land between Boathouse and Garrison's so a person could jump off?

A. One barge on each side would make no difference. There must be one under the stern.

Q. What would you say of that condition of things?

A. I should say that the hawser was not sprung or she would not be there.

Q. What would you say of that kind of management which allowed anything of that kind?

A. I should think it was bad judgment.

Q. Assume the steamboat to have turned West Point and the tows

have got down within about 100 feet of the east shore, and the hawser not having been sprung, what would be the course of the steamboat—what would be the ordinary course of the steamboat without any hawser having been sprung for the purpose of extricating the boats from that situation?

A. She would be apt to head to the westward.

Q. How would that affect the lines on the east side of the tow?

237 A. The east side of the tow it would cramp around the circle and the outside lines would be taut, and the other boats would go right up against one another's stern, so there would be no strain, and the strain would be on the east side while the tow was swinging around.

Q. How would the fact be as to endangering breaking the lines on the port side?

A. That would help to part them.

Q. If there is no barge on one side of a tow-boat in coming around West Point is it usually the general course in coming around there with a tow of 50 boats or thereabouts to spring the hawser?

A. Yes, sir; it is usual.

Q. Is that—how frequently is it omitted by good boatmen?

A. Some steamboats never go around there without springing them.

Q. Did you ever go on the Niagara?

A. Yes, sir.

Q. How was the fact of her springing the hawser with a tow; you was on her?

A. At the time I was on her they did not take those big tows astern; they were alongside.

Q. In coming around West Point with a heavy tow at ebb tide is it customary to hug either side of the channel; what is the usual course of the steamboat, assuming she is coming around at ebb tide, has not sprung her hawser, what would be her course as to hugging one shore or the other, where she should keep without springing her hawser?

A. She should keep along by the westward. If she kept in the right place on the start, whether she sprung it or whether she did not, she ought to keep there.

Q. How far near the west shore?

A. I think you get a tow of 50 boats, steamboat going around the West Point has no business to be any nearer to the east shore than three-fourths way, and she ought to be a quarter way off of the width of the river from West Point, and no further.

Q. And if a tow should part in consequence of not using the hawser in going around West Point which side would she be liable to part, which side of the tow?

238 A. That would not make no difference whether she sprung the hawsers or did not put that.

Q. That is to say, would there be less strain upon her in going around when she sprung the hawser as she would when she did not?

A. If she commenced to turn around West Point, you had no

spring on, these hawsers would keep taut suddenly as long as she kept her wheel over. If they selected the hawser to get a spring that would ease those lines on the tow. By the time they got that line eased up to start along the tail end of the tow would naturally swing around and relieve the tow together.

Q. If the tow parted east of the middle of the river and struck 600 feet south of Boathouse point, ebb tide, where would you think the tow had parted?

A. They would not strike there in no case.

Q. That is the evidence of one witness?

A. I can't help it.

Q. Suppose they did strike; I am assuming they just followed the tide and kept right on with sufficient speed to strike the rocks at that place 600 feet south of Boathouse point?

A. They would drift to the westward.

Q. Where would you think the tow had been parted if the boat landed there?

A. The last line parted along there. I should think they would hit Boathouse point.

Q. Whereabouts in the river you would think the parting had taken place? Here is a part of this tow, and the part that is turned off from the last end, some witness says, floated down and struck 600 feet south of Boathouse point. I want you to use your judgment as to whereabouts that tow parted; how far below West Point?

A. I calculate it parted right at Boathouse point. I calculate the tow hit there and parted there.

Q. I am assuming it parted somewhere in the middle of the tow; broke off somewhere in the middle of the river. It floated with the ebb tide down the river and struck 600 feet south of Boathouse point?

239 A. I can't give no idea of such a thing that would not be done. There is no calculation on a thing that can't be done.

Q. Why could not she strike?

A. Because the tide would set over to the westward and she would not reach that place.

Q. If the detached part of the tow was altogether no part of the tow was on the east shore below Boathouse point?

A. No, sir; no part of it would reach the east shore.

Q. Your idea is that this detached part of the tow struck where if it had broke off if it parted?

A. It has parted above Boathouse point, if it has parted above Boathouse point, if they had struck nowhere of itself, for a long while; drift over to the westward further along down by Cozzens; the minute you left Boathouse point the tide sets to the westward; nothing goes to the eastward after that.

The COURT: If the tow broke in rounding West point it must have struck Boathouse point or nowhere else?

A. Or nowhere else—either got to strike there or nowhere of itself alone without being towed.

Q. That you think can't be so; she could not have struck 600 feet?

A. Not without being towed either by some boat; they would not go there of themselves.

Q. Suppose she did strike 600 feet south of Boathouse point, how do you think she came to strike there?

A. I think she came there by some steamboat or blowed by some wind; if she struck 600 feet below Boathouse point the Niagara towed her there; if there was no boat to tow her Niagara must have towed her there then.

Q. What experience have you had in those waters in that vicinity? What have you seen and done there?

A. I have sailed sloops; drifted up and down there; towed rafts up and down there; all kinds of experience there; drifted and rowed sloops in around there.

Q. Is it changed any by the fact that there is several boats attached together there; any more likely to strike than when
240 at that point? Suppose there were about 35 boats together, and this barge of the plaintiff was on the port side of the tail end; now what would you think of the possibility of that barge striking 600 feet south of Boathouse point without being towed there by the Niagara?

A. Why, she could not get there without being towed there.

The COURT: Suppose that the steamer was pulling the boats off the east shore when the lines broke and that the steamer was towards the east shore, more to the east of the middle of the river than the west; then the lines parted, where the boats drifted, to what point?

A. It is according to where they were when the lines parted.

The COURT (reading from Ryan's testimony:) "Were you in the tow of the Niagara on that day when the accident occurred to the barge John T. Lee?" "I was." "How many boats in the tow?" "I should judge about 49 or 50." "Where was your boat's position?" "I was in the fourth tier, second boat from the outside on port side—that is to say, the east side." "Where did the accident happen?" "Probably 400 feet north of Garrison's." "What was the shape of the tow at the time they were headed down the river; had they passed West Point?" "Yes, sir; we had passed around West Point." "Was the tow straightened out?" "Yes, sir; it was in a straight line down the river." "Please describe the accident from the beginning." "The tide sets to the east shore there very strong, coming around the point; when she was pulling us off the east shore, that broke loose; our lines all parted; five boats all parted together, commencing on the third tier and continued, so that four boats of the fourth tier broke loose." (See pages 86 and 87, printed case. Where the accident occurred, whether he means by that the place of the striking, or whether he means by that the place where the tow lines broke, as you have heard me read; where did that strike?

A. They struck right on Boathouse point, according as that man

swears; the tow struck on Boathouse point, he says, rounding West point, the tow broke off. He might call West Point
241 further up; the light-house is right on the very point. I am taking for granted it was the light-house.

The COURT: Where and how would you locate the boats and the break and the striking and so that the striking comes at West Point? How would you locate the boat and the accident so as to have the boats strike Boathouse point?

A. That is owing to whether the boats are broke in two or whether they hung together yet.

The COURT: How do you locate that accident according to this evidence?

DEFENDANT'S COUNSEL: I don't think it is proper for this witness to give his conclusion from that testimony; that the witness is not to judge of it; it is for the jury.

(Not answered.)

The COURT: Suppose that the boat broke or the hawser broke or the line broke in making the turn at West Point, where would you locate the striking of the boats if that happened in that form?

A. On Boathouse point.

The COURT: Suppose the breaking occurred when they were 400 hundred feet south of Boathouse point, how then would you locate—where would the boats have drifted then?

A. Drifted over to the westward.

The COURT: Could you locate where the breaking must have occurred if the boat struck on the 600 feet south of Boathouse point?

A. If that struck 600 feet south of Boathouse point, close in there, two or three boats, they would not probably drift to the westward. They would probably go down to the east shore. They would probably stay along the east shore. They would not go there of themselves. They would not go there of themselves.

The COURT: So that if the boat struck six hundred feet below Boathouse point?

A. They were towed there.

The COURT: If they struck 600 feet south of Boathouse point they must have been towed there?

A. Yes, sir; or by some wind; calm they could not go there of themselves.

242 The COURT: If the line parted and they drifted, or if the line parted before they got there, they could not have drifted there?

A. If they drifted before they got to Boathouse point, they could not drift to there. If you are pulled there by something or rowed there or get there some way, five or six hundred feet below the Boathouse point, then you would stay there. If the tow did not break in two until it got below Boathouse point, it would not do no hurt at all in a long while—a good ways to drift before it would do any hurt. It would have to drift two miles if it parted below Boathouse point. It would do no harm.

The COURT: If the tow had broken in two in rounding the point, where would the boats have struck by a drift?

A. Strike Boathouse point, and they would strike there even if they were in tow of the steamboat, if the steamboat did not keep far enough to the westward.

The COURT: So that the fact of the boat striking upon the rocks 600 feet below Boathouse point satisfied you as an experienced navigator that the tow had not broken up to the time of the striking or what? You say if the tow had broken in two rounding West Point, then the boats would have struck by the drift. If that happened in that way it would have struck Boathouse point?

A. Yes, sir.

The COURT: If the tow broke south of Boathouse point, then the tow would not have struck or the boats would not have struck 600 feet below the point?

A. These rocks where the steamboat was east and west when they parted, if they were in the middle of the river.

The COURT: The location of the steamer being in the middle of the river?

A. They would not have gone near to the east shore. They would have gone to the westward.

The COURT: Assume the fact to be that this boat struck the rocks 600 feet below Boathouse point, does that enable you, as a boatman, to determine how the boat got there?

A. She was towed there by the boat that was towing her.

243 The COURT: That is to say, you mean that the lines could not have parted?

A. If the lines had parted then she would have drifted to the westward; if the lines had not parted and the steamboat towed her, she would have got there by the steamboat towing there; if she had not parted the lines the steamboat towed her there.

The COURT: If the break in the line occurred when the steamer was rounding West Point, then the boats would have struck, if they drifted, on Boathouse point?

A. Yes, sir.

The COURT: If it broke after the steamer got below Boathouse point, if the steamer was in the middle of the river, they would not have struck?

A. No, sir.

The COURT: Would you conclude they were there hauled by the steamer?

A. If they hit there 600 feet below Boathouse point they were hauled there by the steamer.

Q. How would that conclusion be effected by the fact that after they struck they floated right along east shore below Garrison's, where they were picked up; what would that indicate to your mind?

DEFENDANT'S COUNSEL: Objected to on the ground that it is assuming the fact not in the case; that it is incompetent for the wit-

ness by a theory to contradict the proof in the case; the question is improper and incompetent.

Overruled. Exception by defense.

DEFENDANT'S COUNSEL: Generally objection it is incompetent on the part of the witness to contradict by theory the evidence in the case.

Exception by defense.

Objection and exception by defense in reference to all this testimony.

The COURT: Yes.

A. They would not go there; they would not go close along to Garrison's.

The COURT: You have said from your conclusion to my question that if the boat struck 600 feet below Boathouse point, then she must have been hauled there?

A. Yes, sir.

244 Q. Where would this detached portion of 35 boats float, left to themselves, if they struck below Boathouse point 600 feet?

A. They were close in and struck there, they would stay there along the east shore.

Q. What does that show, assuming that they did?

A. They show they have hit there, were towed there, and stayed there along that shore.

Q. Suppose this tow had parted in the river, say anywhere from 100 to 500 feet from the east shore, immediately after rounding West Point, at a place where they would go east—where the broken part would go east—what was the proper course of the hands on the barge, this barge being the tail end of the port side?

A. For the men on the barge?

Q. What should they do?

A. Could do nothing; nothing to be done. What shall I answer a question before it is asked me? They could do nothing; they would stand on the barge's deck; just the same — they were made up in the tow; could not do nothing more than to go on at the present.

Q. But they were going east, we will assume, towards the rocks of the shore.

A. How could they help themselves? They could not help themselves; they would have to go ashore.

Q. Could not they anchor?

A. No, sir.

Q. Why not?

A. Because, in the first place, the tide runs east about two miles an hour, certain, if not faster—at the least calculation two miles an hour; now, then, in less than three minutes you would drift way down to Boathouse point, in less than three minutes you would drift down there; in the first place, it would take — before they were no break; they break loose five or six lengths before they could get news that they actually broke loose—at a minute and a half to know they

were loose, or two minutes; after they knew they were loose, by the time they go up and cast their lines and get their anchor ready and get it overboard three or four or five minutes elapses; by that time they would drift in three minutes—they would drift the whole
245 length; they would be all out of danger; they could not get it over; if they were a mile above there it would do to let the anchor go, but at that point it would do no good and strike the rocks. Suppose I did cut loose and let the anchor go; by that time I could get the anchor catch her, swing towards the rocks; the blow would be harder against the rocks. Suppose the boat drifted loose, then they would say, "You had hit her; cut your barge loose; you cut the barge loose at your own risk."

DEFENDANT'S COUNSEL: I move to strike that out—"suppose you was, and suppose this."

The COURT: I think the witness has a reason to give his reasons why it is bad policy. The reasons may be poor reasons; then, of course, you have the benefit of that to the jury; then they may be good reasons.

Exception by the defendant's counsel.

Q. What do you say about the ability of skillful men on that barge at the time the tow broke apart, with a boat and a line, — cut her loose and fasten her to the shore? Why could not she be saved in that way by the expediency of that course, or tow her away from the shore?

A. Had cut her loose from the tow, she would stay right there just the same, as long as they did not touch nothing; they would by drifting along together.

Q. With a small boat and line?

A. What would you do with a small boat? It is to handle the large barge anyway, without the small boat. It is a job to have men to calculate. In a sloop you drift, you calculate to have everything ready—big, long oars for the purpose of doing it, let alone pulling a heavy barge, and that with men in a small boat.

Q. With a lot of men?

A. If you had a whole regiment and all fixed to do it you could do anything.

Q. How would the propriety of such a course—trying to save her with a boat and line—to be effected by the fact it was a dark night?

A. It would be nonsense to talk about it, nonsense to think about save a barge. No experienced man would think of such nonsense to ask it.

246 Q. If they had a small steamboat?

A. They could have done very well then.

Q. So that if the hands on this barge stuck to it after the parting, your judgment is they did just right after the parting of most of the tow?

Objected to and not answered.

Q. What is your judgment as to the skillfulness and propriety of

the hands on this barge sticking to the barge, not attempting to anchor her or cut her loose?

A. It is good judgment.

Q. When she approached the shore what do you say of the good judgment or bad judgment of the hands using a fender?

A. It might be if the rock was not under water anywhere; there was one stuck out. A fender might do some good in places, and keep the barge off; it would do the same good hitting a dock.

Q. Do you know anything about whether there are rocks on that shore between Boathouse point and Garrison's at the water's edge?

A. Yes, sir.

Q. And under water?

A. That I could not say, how much there is under water.

Q. Whether the low tide exposes rocks that cannot be seen at high tide?

A. I don't know that I ever noticed.

Q. Assume that the tow parted just about the time of rounding West Point, you have heard it (this long tow with its long line), in what direction should the steamer have been headed at that time as to being east or west, or how?

A. She should be headed south; if anything, southeast a little.

Q. What do you say as to the manner in which these boats that are towed from New York to Albany are manned with help usually?

A. That boat, or other boats?

Q. Boats generally.

A. I have often seen two boats sent with one man. I have known one man on two boats.

Objected to.

The COURT: That is not a good question.

247 The COURT: What is the usual way?

A. Usually two men or a man and boy.

Q. Is any seamanship required on a barge or canal-boat?

A. Why, no, sir.

Q. They never ask it or exact it?

A. No, sir.

Objected to by defendant's counsel as incompetent and improper.

The COURT: I do not know what he means by that.

A. The owners of the barge.

The COURT: If the witness by that meant to say that it was not customary for the owners of the tow-lines to require more than that, why I think that may be proved as a custom.

A. It is not customary or is not asked by the steamer owners or the owners of the boat to have over two men on a barge like the John T. Lee. I have seen that barge. I have seen her pass up and backward, as far as going to New York and back. As far as help are concerned the hay barge has only two men—a big, double-decked barge. Taking care of them on the passage two men is all that is required.

Q. The tows are usually made up of vessels from what place?

A. Schuyler's line they usually made up from canal-boats; that is, the heft of the tow, bulk of the tow, is canal-boats; then there is barges with them.

Q. Are you acquainted with the custom among them as to inquiring at all as to the competency, skill, seamanship of the men that go with the boats to New York?

Objected to; not answered.

The COURT: Do you know their custom in that respect?

A. Custom what men they usually have on these boats?

The COURT: Do you know what their custom is?

A. Their custom to hire just as cheap a man as they can get.

Judge MCCLELLAN: To go on barges?

A. Yes, sir; custom of barges and canal-boats.

Objected to by defendant's counsel.

The COURT: I think that is competent; a man pursues the ordinary custom. I do not see but what it is competent.

248 Exception by defendant's counsel.

Q. Whether or not the tow-boat lines exact skill and seamanship in navigation at all from the men on the barges and canal-boats that go down.

Objected to; he has not been proved competent to show it.

(Not answered.)

The COURT: Do you know what their custom is in that respect?

A. Yes, sir; why, they do not exact any good men; never say anything about what you got aboard; go up and get the boat in there whoever may be on it; do not think for a moment whether they are skillful or not.

Q. How in respect to the requirement that the captain shall be on board during the voyage—canal-boat or barge?

A. Often do not ask whether the captain is on board; they often, in making up the tow, they say, "The captain is not here." "Why, go on without him." It is not necessary for the captain to be there.

Objected to by defense; this witness cannot state a conclusion.

The COURT: I will allow it to stand.

Exception by defense.

Q. Did you hear the witnesses, James Smith and Samuel Brousseau, tell about the hole that was knocked in the bottom of the barge by striking on the rock?

A. Yes, sir.

Q. What ought they to have done under the circumstances?

A. I heard them sworn what they did do.

Q. What was that?

A. They said that the barge struck, I understood them, and they took off their hatch and went down and looked, saw where the leak was, and one went to the pump, finally got a canvas put over the hole, and went down and got a pillow and tried to stop this hole.

Q. What do you say as to the good judgment of that proceeding?

A. No man could do any better.

Q. Assume that they were, then, afterward taken into the tow by the mate of the Niagara, what do you say as to the good
249 judgment of those men under the circumstances in going there in the condition in which the leak was with the canvas apparently having stopped it?

A. That is owing how the canvas was fastened.

Q. Assume it was fastened by these two men and other men about there with ropes at each corner and then fastened over the deck. Your judgment as to the course of the hands in permitting themselves to be taken into the tow by the mate.

A. I had the canvas over, as they swear, and partly stopped the leak. I should think that would be good judgment, to try to go on. I might as well go as to stay there; is about as good judgment to go as to stay there.

Q. Suppose the canvas came off afterward, after they got into the tow, what would be the proper course in respect to it—good judgment, I mean; large hole, probably six inches or thereabouts, and the water rushing in, what would be the proper course then?

A. I would try to get the canvas back again if I could.

Q. Could it be fastened, then, from the inside and stop up the hole?

A. Plank, they swore, was bruised up; bulged up; pretty nice job to stop it on the inside. It is pretty nice thing to stop it on the outside. It is pretty hard job to stop a boat under, if the hole was splintered all up and a hole here and hole there and a plank bulging up. You might have another plank ready and shore it. It would spin out there and spin out there. I don't think you could make very much success to try to stop it on the outside.

Q. You had experience in trying to stop leaks?

A. Yes, sir.

Q. Assume these things were done which it has been assumed were done in respect to that leak. What, if anything, more could have been done to save that vessel than was done?

A. I can't say that they could do anything more at that time of night without help from some other source than those two men.

Q. What difference three have made?

A. When I speak of help it is a tug or something to tow them off a shore or a pump about them; an extra steam-pump put in them to keep them afloat.

250 Q. How about the usual course and practice of tow companies in respect to carrying small boats that they take them along with them on these barges up and down?

A. There is Lord & Murray's have got 5 and 6 barges running up and down. There is no boat on either of them.

Objected to by defense.

The COURT: An instance of a particular individual is incompetent.

A. It is not usual to carry a boat. There is not one out of twenty that has a small boat.

Cross-examination.

By Judge McCLELLAN:

Q. How old are you?

A. I will be 58 years old 16th day of July.

Q. You are somewhat aquainted with this river, I suppose, as you said?

A. Yes, sir.

Q. (Showing chart to witness.) Look at that and tell me what that paper is.

A. (Reading:) Hudson river.

Q. What else?

A. (Reading:) From Haverstraw to Poughkeepsie and New York.

Q. What else?

A. Survey of the coast of the United States.

Q. That reads it is a map of the survey of the coast of the United States?

A. Yes, sir.

Q. Are you conversant with that map?

A. No, sir; I never seen it before.

Q. A map similar to that; same kind?

A. I don't know that I am.

Q. Do you know the use of it? Are you acquainted at all with the use of it?

A. I don't know what you mean.

(Question repeated.)

A. No, sir; I am unacquainted with the use of that map.

Q. Have you any learning or experience in regard to the river shores or banks or bottom except what you have seen yourself?

A. No, sir.

Q. Have you ever anchored anywhere within two miles of West Point?

A. Yes, sir.

251 Q. Where?

A. I have anchored to Coun's Hook; that is more than two miles; I have anchored to Buttermilk Falls.

Q. Is that within two miles?

A. I should think it was; I have anchored this side of Buttermilk Falls.

Q. Where else?

A. I have anchored to the westward above that.

Q. Up where?

A. Up by where the West Point dock is now, anchoring all along down that shore from Buttermilk Falls.

Q. What depth of water?

A. That I could not say.

Q. You have anchored there; you must know about the length; how many fathoms?

A. Never measured the chains.

Q. Any idea?

A. Yes, sir; that is according to how close in shore I was; I have anchored on the flats where there was not over ten feet.

Q How far from West Point?

A. Just around the point.

Q. Where next below that have you anchored?

A. I have anchored at Coun's Hook island; that is more than two miles.

Q. Between that and Coun's Hook island and this place right below the West Point have you anchored?

A. I can't remember now.

Q. In the boat you say on what length of chain did you carry with your anchor?

A. That I do not know; never measured it.

Q. Never knew?

A. Never knew how long it was.

Q You know how much a fathom is?

A. Yes, sir.

Q. How many yards is it?

A. Six feet.

Q. How many yards?

A. Two yards.

Q. You never anchored along on the east side anywhere?

A. I don't know that I ever did.

Q. When was your first experience in command of a tow-boat on the Hudson river?

A. I can't remember dates worth a cent.

Q. When was your first experience in the command of tow-boats on the Hudson as captain?

A. I can't tell when it was.

252 Q. Tell as near as you can.

A. I don't know as I can remember anything about how long ago it was.

Q. Tell as near as you can.

A. I would not get very near it.

Q. As near as you can.

A. Perhaps 15 or 20 years ago; maybe not so long, maybe longer; I can't tell anything about it; I can't tell how long it was.

Q. Do you think it was as long as 15 years ago?

A. I can't——

Q. As ten?

A. I can't tell; you can't get out of — what I can't tell.

Q. Would you think it is as long as five years?

A. Yes, sir; it is longer.

Q. As long as six?

A. I can't tell.

Q. What boat was that that you commanded then?

A. Syracuse, one

Q. Who owned her?

A. Jerry Austin.

Q. How long did you command her?

A. One season, with the exception of a few trips.

Q. He was a tow-boat man, living in Albany?

A. Yes, sir.

Q. How long ago was it that you commanded the second boat that did towing on this river?

A. I commanded the Ohio and her together two seasons; from one to the other in two years.

Q. How long ago was it that you commanded?

A. I have told you I could not tell.

Q. Did you command the Ohio after you commanded the Syracuse?

A. The Syracuse was the last one I commanded.

Q. Now, the first boat that you commanded, that you can tell, it was six years ago; what boat you can tell you first commanded?

A. New Haven.

Q. Is that the boat you are not willing to testify you commanded six years ago?

A. That is the boat; I can't tell how long ago I ran her.

Q. Was the New Haven and this boat you refer to that you answered me you could not tell?

A. No, sir; I did not refer to any particular boat.

253 Q. When and how long ago was it when you first commanded a steam tow-boat on this river?

A. I do not know.

Q. Was it five years ago?

A. Longer than that.

Q. Was it six?

A. I don't know as I can tell. I think it was longer.

Q. That first steamboat you commanded—that you won't tell and don't know whether it was longer or shorter than six years ago—what boat was that?

A. I can't remember.

Q. How long ago was it?

A. I do not know.

Q. And what was the name of that boat?

A. Which boat?

Q. That boat you don't know — long ago it was you commanded.

A. I don't know whether I went on the New Haven, but I did the Ohio that year. I think I went on the Ohio first. I don't know whether I went on the New Haven, but I did the Ohio that year.

Q. I am speaking of the commanding a steam tow-boat. Tell me which was the first steamboat which you commanded as commander. You may call it what you please; captain is what I mean by it.

A. I don't know how long it is.

Q. What boat was it?

A. I think it was the Ohio.

Q. You say you don't know how long ago it was?

A. I do not.

Q. Was it six years ago?
A. I think it was longer.
Q. Was it seven?
A. I should not think so.
Q. Was it eight?
A. I can't tell.
Q. That boat, how long was you captain—the first boat?
A. I commanded her and the Syracuse.
Q. How long you commanded that first boat?
A. I can't tell how long I was captain.
Q. Have you any idea?
A. I was captain of her, I suppose, six months, five months.
Q. That was Jerry Austin's boat, the Ohio?
A. Yes, sir; I suppose it was.
Q. That you commanded about five months?
A. Yes, sir; I might have been longer and might have been shorter.
254 Q. Was it a year?
A. No, sir.
Q. Was it a whole season?
A. The first year it was not the whole season; not quite the whole season.
Q. Now, who were the officers under you on that boat; who were the officers under you in that boat that part of the season you ran it?
A. Allen Gage. I don't know where he is now.
Q. Do you know whether he is alive or dead?
A. I do not.
Q. Name another officer.
A. Thomas Passenger. I don't know whether he is alive or dead.
Q. Is there any other officer under you in that boat?
A. Yes, sir.
Q. Who?
A. Richard Janes; dead, I think.
Q. Is Austin dead?
A. I could not tell you. I have heard that he was.
Q. Did you tow any barges down that season with the Ohio?
A. Yes, sir.
Q. What barges?
A. Jerry Austin's.
Q. What barges?
A. I don't know as I can tell you the names of them now.
Q. Can you tell the name of any of them?
A. I think one was the Roberts.
Q. Tow it from Albany?
A. Yes, sir; I think Jerry Austin pretended to own her.
Q. Did not Jerry Austin have a small boat on her?
A. No, sir; I am sure he did not.
Q. What other one did you tow down?
A. I think the Coit; some such name.
Q. How is it spelled?

A. That I don't know. I don't remember now just what her name was.

Q. Are you in any way certain about her name?

A. I can't give you the names exactly what they were. I know the Roberts. Coit, I think, was the name of the other. I won't be sure.

Q. Can you name any others that you towed that season?

A. Davis.

Q. These boats owned by Jerry Austin?

A. No, sir.

255 Q. Who owned them?

A. I don't know; she was a lumber barge. I towed the Jacob Duryea; I don't know who owned her; she carried lumber; I think his name was Marshall?

Q. Name any other barges you carried that season with the Ohio.

A. I don't think of them now.

Q. How many years ago?

A. I told you I did not know; you can't get blood out of a stone, what I don't know.

Q. Tell me how many years ago you are sure it was.

A. I can't tell; I am not sure.

Q. Are you sure it is five years ago?

A. I have told you yes; I think it was five years.

Q. You are sure it was?

A. I think so.

Q. You don't think it was six years ago?

A. I did not say that.

Q. But how?

A. I think it was six years.

Q. Do you think it was seven?

A. I won't go any further than that; I don't know.

Q. Will you swear it was not 25 years ago?

A. No, sir.

Q. That you are sure was five; you think it was as much as six, and won't go further?

A. Perhaps it was more; I don't remember.

Q. Was it perhaps 25 years ago?

A. I can't tell.

Q. The next boat that you commanded, you acted as captain; when was that?

A. That was the next year when I was in the Ohio.

Q. What boat was that?

A. Syracuse.

Q. How long did you command that?

A. I went on her—I don't know; I can't tell how long; I can't tell.

Q. Did you command it a month, two months, or three months?

A. Yes, sir.

Q. Four months?

A. That I can't tell.

Q. You are sure you commanded as much as 3 months in all you commanded her?

A. Yes, sir; more than two.

Q. Four or five or six months?

A. Yes, sir.

Q. Seven months?

A. That I am not sure about.

256 Q. Do you mean you commanded her four months together?

A. The first time I went then; now you have got the whole season in.

Q. How long have you commanded her; you could not tell whether you commanded her four months?

A. I did not understand you.

Q. The whole time you commanded the steamer Syracuse; how long it was.

A. Syracuse was the second boat.

Q. Syracuse; then how long it was.

A. Six months in all.

Q. All in the same season?

A. Yes, sir.

Q. Can you tell me who acted as an officer under you on that boat that season?

A. Allen Gage.

Q. The same Allen Gage you spoke of before?

A. Yes, sir.

Q. Who else?

A. I don't know whether he went in the Syracuse or not. Lansing—I don't know where he is.

Q. Who else?

A. David De Witt. I don't know where he is.

Q. And don't know whether he is living or dead?

A. I do not.

Q. That is one of Austin's boats?

A. Yes, sir; it was.

Q. Any other officer under him on that boat that you can name?

A. Yes, sir; Smith Marshall. I don't know where he is; the last time I heard of him he was in Coxsackie.

Q. How long after was that?

A. I don't know.

Q. How long ago that you heard of it?

A. That I don't know.

Q. Ten years ago that you made that inquiry?

A. I do not know.

Q. Was it five?

A. I can't tell.

Q. Was it three?

A. I can't tell.

Q. Was it two?

A. I can't tell; it might have been six last winter. I have often inquired about him.

Q. What barges did you tow down that season?
A. I don't know.
257 Q. With the Syracuse.
A. I don't remember what barges.
Q. What steam tow-boat did you command after that?
A. I think it was the New Haven, or the New Haven before that or after that.
Q. You have sworn you commanded the Syracuse the next season after the Ohio?
A. Yes, sir.
Q. The next boat you commanded after you commanded the Syracuse.
A. I think it was the New Haven.
Q. And how many years ago was that?
A. I don't know.
Q. Any idea?
A. No, sir.
Q. Can you tell me within five years?
A. No; I don't think I could.
Q. Will you swear it was five years ago?
A. I will swear it was more than that.
Q. Will you swear it was 25 years ago?
A. Every question I answer I answer under oath.
Q. Will you swear it was 25 years ago?
A. I don't know whether it was or not.
Q. Are sure it was not 30?
A. No, sir; I don't — whether it is 30 or not.
Q. Name the officers under you on the New Haven.
A. I think it was Briggs, one. I think it is Hipe Briggs.
Q. Where is he?
A. I could not tell you.
Q. How long since you have seen him?
A. I have not seen him in a good while.
Q. Fifteen or twenty years?
A. I don't know whether I have or not. I don't know that I have seen him particularly to know that he was in the New Haven.
Q. Do you know where he is?
A. No, sir.
Q. Don't know whether he is alive or dead?
A. I do not.
Q. Who else as an officer was under you?
A. I don't know; I forget.
Q. You can't name any other?
A. I think I steered the other watch myself; I think I was captain and pilot, too.
258 Q. How long did you command her?
A. O, I guess probably a couple of months.
Q. Was that one of Austin's boats?
A. No, sir; belonged in Troy.
Q. To whom?
A. McDonough; part of them owned her; 5 or 6 of them; one

was the Charlie Haner; one was Lorenzo Collie; one was Riley; one was McLean; the whole, about, of them lived in West Troy.

Q. You said, I think, that you acted as pilot?

A. Yes, sir.

Q. When was that?

A. Quite awhile ago.

Q. About how long?

A. I went pilot before that; before I went on the other boat.

Q. How long ago was it that you was pilot?

A. All of 30 years ago.

Q. What boat did you venture to be pilot upon first?

A. Buffalo.

Q. The first one?

A. Hudson. I think the Hudson was the first one I went pilot of that I went through.

Q. Who owned that?

A. I think they call it Brainard's line—Lew Brainard. I won't be sure what his name was.

Q. This Hudson; how long did you act as pilot on her?

A. Oh, part of a season.

Q. That, you say, was about 30 years ago?

A. I should judge it was.

Q. What boat next did you take as pilot?

A. I can't tell.

Q. What is the next boat that you recollect?

A. I can't tell you.

Q. You have no recollection of taking any other boats?

A. Yes, sir; I went on other boats.

Q. Tell the next boat that you took —acted as pilot—that you recollect now.

A. I don't recollect what one.

Q. Tell me some one that you went on next, that you do recollect after that.

A. I think it was the Norfolk.

Q. How long ago was that?

A. That was about the same time.

259 Q. What did you do between the time that you left the Hudson and went on the Norfolk?

A. That I don't know.

Q. How long ago did you act as pilot for her?

A. I don't know; I don't remember.

Q. Several seasons?

A. No, sir.

Q. A whole season?

A. I don't remember; I think she did not run the whole season; it was John G. White's boat.

Q. How long ago — think it was?

A. I do not know.

Q. How long a period?

A. I can't tell.

Q. Whether you worked upon the river between the time that you were upon these boats, the Norfolk and the Hudson?

A. I think I was pilot; I think I was pilot on the American Eagle; I don't know when it was; I have told you that I don't remember them.

Q. I have asked you——

A. I can't tell you.

Q. I asked you to tell me what was your means of livelihood during the interval of the time that you was pilot on the Hudson and the time that you was pilot on the boat that you named, the Norfolk.

A. Steamboating all the time.

Q. On what boat?

A. I can't tell; I was on so many different ones I can't tell; I never charged my mind with it, and I don't remember anything about it.

Q. You was steamboating in that interval?

A. Of course.

Q. Name a boat that you was on during that time.

A. I can't; I can tell you a great many different boats I was on, but I can't tell you when I was on.

Q. In what capacity were you steamboating acting during that interval?

A. I did not know what boat it was.

Q. How long did you work, being pilot on that steamboat?

A. What steamboat?

Q. The one you was pilot after you was on the Hudson.

A. What one was that?

Q. You said you was occupied in piloting a steamboat be-
260 tween the time when you was piloting the steamer Hudson and the steamer Norfolk; that is what you said—that was your means of livelihood. What boat was that?

A. I don't know.

Q. How long are you engaged say in piloting on that boat, whatever it was?

A. I do not know.

Q. And who was working with you?

A. That I don't know.

Q. When was you last in charge of a steam tow-boat?

A. Last summer.

Q. What boat was that?

A. John A. Griswold.

Q. For how long a time?

A. Whole season.

Q. That was a steam tow-boat?

A. Yes, sir.

Q. Towing from where to where?

A. Towed from Rondout to Albany, and from Troy, making up a tow in Rondout creek, backward and forward.

Q. That was last season?

A. Yes, sir.

Q. What was you doing in the steamboat line season before last?
A. In the Griswold before that.
Q. What was you doing three seasons before that?
A. In the John V. Winslow, towing to New York; steam tow-boat owned by Vroman & Co.
Q. How large a boat was that?
A. I think she was 70 feet long.
Q. How large a tow did you usually carry down the river with her?
A. O, I have had six and seven and eight boats.
Q. What kind of boats?
A. Hay barges and canal-boats.
Q. Did you spring a hawser on that boat?
A. No, sir; did not have to; she was a little boat.
Q. Then that was three years ago?
A. Yes, sir.
Q. And when before that?
A. In the Winslow; same business.
Q. Spring the hawser on that?
A. I did not have to spring the hawser with a propeller.
Q. Any of these other boats propellers that you have been naming?
A. The rest were side-wheel boats.
Q. Before that what boat was you in command of?
A. Winslow again.
261 Q. How many years the Winslow?
A. Three.
Q. In the same business?
A. Yes, sir.
Q. Before that?
A. Then I was ashore a spell.
Q. How many years?
A. I do not know.
Q. How many years was you off boating?
A. I do not know.
Q. One year?
A. Yes, sir.
Q. Two years?
A. I think so. I owned a couple of propellers; I was off and on them.
Q. You was off how many years?
A. I was not off no time one whole year that I remember of now.
Q. The year before you took the Winslow what was you doing?
A. I don't remember whether I was boating or not before that or not.
Q. The year before that do you remember what you was doing?
A. You are going back to dates that I don't remember anything about.
Q. You can't count?
A. I can count dollars.

Q. You can't count numbers?
A. Yes, sir.
Q. Tell me what boat you commanded—a steam tow-boat, side-wheel tow-boat—last one you commanded before you was on the Winslow, which was a propeller.
A. It was either the Syracuse or the New Haven.
Q. And they were owned by Austin?
A. One of them—the Syracuse.
Q. Don't you know whether you was working for the Troy line before or after?
A. I do not recollect.
Q. That was only one season?
A. Yes, sir.
Q. You think it was the season before that that you commanded the boat of Austin?
A. I won't be certain that it is so long ago.
Q. How long has Jerry Austin been dead?
A. I could not tell you.
Q. Have you any idea?
A. No, sir.
Q. Wasn't he dead ten years ago?
A. I do not know.
Q. Was not he dead 15 years ago?
A. I do not know.
Q. Wasn't he dead 20 years ago?
A. I do not know.
Q. Will you testify here that you had not heard of Jerry Austin's death here 15 years ago?
262 A. I would say that I don't remember nothing about it. I have heard of his death, but when I don't know.
Q. Did not you hear about the sale of his boat property in Albany?
A. Yes, sir.
Q. How many years ago?
A. I do not know.
Q. Was not that 15 or 16 years ago?
A. I do not know.
Q. How large a boat was the Ohio?
A. That I do not know.
Q. About?
A. O, she was probably 200 feet.
Q. How large a boat was the Sandusky you were pilot on?
A. One hundred and fifty feet.
Q. How large a boat was the Hudson that you first piloted?
A. She probably not far from 200 feet.
Q. How large was the largest boat you ever commanded?
A. Syracuse was the biggest boat. I don't know how large she was.
Q. How large a tow did you use to carry with her?
A. Different sized tows.
Q. How large was the greatest?

A. I remember towing once with it 45 boats.
Q. She was a boat as big as the Niagara?
A. Yes, sir; she had as much power as the Niagara.
Q. Was she a boat as large as the Niagara?
A. Might not have been as big a hull, but she had more power.
Q. She gets her power from her engine?
A. Yes, sir.
Q. She could do more than the Niagara?
A. Yes, sir.
Q. I think you said you had been on the Niagara in some capacity?
A. Yes, sir; that was a good while ago.
Q. How long ago?
A. I think likely that must have been 30 years ago or more.
Q. Was she a passenger boat at that time?
A. No, sir.
Q. Who owned her then?
A. Durand.
Q. Who commanded her?
A. Elias Brown.
Q. Is he alive?
A. I could not tell you.
Q. In what capacity was you to work on her?
A. Mate.
Q. Taken tows down with her then?
A. Yes, sir.
263 Q. Barges?
A. Yes, sir.
Q. You say you have been boating about 40 years?
A. Yes, sir.
Q. You got up to commander about 30 years ago; what did you do the first ten years?
A. I went first cook on a sloop.
Q. How long?
A. I went cook 2 or 3 years.
Q. What next was your position?
A. I think I went 3d hand on a sloop.
Q. How many years?
A. That I do not know.
Q. Two or three?
A. I can't tell.
Q. More than one?
A. Then I went 2d hand.
Q. How long on that?
A. Two or three seasons.
Q. Then from that what next position?
A. Then I went pilot of a sloop.
Q. How long pilot of a sloop?
A. I was pilot on that sloop one year.
Q. I understood pilot how many years?
A. I was in command, pilot, or commander sloop one year.

Q. The next pilot?
A. That I don't remember.
Q. You have more than ten years' experience there?
A. I might not.
Q. Then you jumped from there to being captain of a steam tow-boat?
A. No, sir.
Q. You must.
A. No; I did not.
Q. You have been in the boat business?
A. I guess at it; I am only guessing.
Q. I thought you was testifying?
A. I said I did not know. I think likely I might be mistaken.
Q. How many boats in the hawser tow is the largest tow you ever took down?
A. That I could not say.
Q. In your judgment?
A. My judgment the largest I ever took down, in my judgment, of canal-boats, probably, I might have took 60 boats; maybe not so many; maybe 50.
Q. That is the largest?
A. I think of now.
Q. In towing that you frequently came across ebb tide on the way down?
A. Yes, sir.
264 Q. I understood you to say when going down with a tow of 50 or 60 boats, when you came in the vicinity of Magazine point coming down with the tow you would guard the steamboat over to the west shore?
A. No, sir.
Q. You said when you came to the vicinity of Magazine point you would keep over towards the westward?
A. No, sir.
Q. You did not testify?
A. I said I would keep along close on Magazine point, get a start, and then when I went down further I would go to West Point.
Q. That when you got to Magazine point you would keep towards the west shore?
A. If I said so I did not understand the question.
Q. You mean to say that you would keep close to Magazine point?
A. On the first start.
Q. And then you would go straight over towards the further side right straight south?
A. No, sir.
Q. What direction from Magazine point would you — with a tow-boat of 50 boats; would you keep ahead of that boat from Magazine point?
A. Nearly east for a spell.
Q. More east than south?
A. Yes, sir.

Q. The first move at Magazine point would be to go east; how far would you go?

A. I would go until I came to West Point light; just before I got to West Point light I would head her to the southeast.

Q. You say you would go more east than south immediately as you left Magazine point?

A. Yes, sir.

Q. And you would keep a course more east than south until you got where?

A. Until I got pretty near West Point light-house, probably 100 feet above the light-house.

Q. More east than south?

A. Yes, sir.

Q. Then what?

A. And then I would head her for the light more west than south.

Q. That would take you still further west than the light-house?

A. No, sir.

Q. You would head her west of south?

A. Yes, sir.

265 Q. And you would keep that headed that way until when?

A. According how fast the tide was drifting.

Q. You know how it ordinarily drifts?

A. Until I got so I could clear the point.

Q. You would not care how close you were to it?

A. O, yes; I would not go close enough to hit.

Q. Then you would be on it?

A. Yes, sir; if I hit.

Q. There is no difficulty in going close if you don't hit it?

A. If you turn the light-house there is a little flat.

Q. How near the shore of the river would it be prudent to go there in rounding West Point?

A. You can go as close as you are a mind to. If you hit that flat you won't do no hurt.

Q. Then it would be nothing imprudent in keeping the boat off its width of the shore in rounding the point?

A. That would be a little closer than it would be necessary.

Q. About how many feet would it be what you would call just right?

A. It would be about, I should think, just right to satisfy me with that amount of tow—a hundred feet from the edge of the flats.

Q. One hundred feet to the east?

A. One hundred feet east of the flats—that is, on the start.

Q. I mean right opposite the point you think that would be just right—about 100 feet off?

A. Yes, sir.

Q. Would it affect or materially endanger your chances for a safe voyage if you weren't over 50 feet off that point?

A. O, well, there is quite an eddy tide in there; might catch my bow to bother me. It would give me a little more work.

Q. It would not endanger or risk your tow any more for being 50 feet further west than it would at a hundred feet?

A. No; I don't know as it would.

Q. Would it not be better for the tow in going around that point if the boat is close as it would comfortably get to West Point?

A. No, sir; you would get so close you would fetch—you would go so close to get in the eddy tide.

Q. You are off the point. There is no tide directly off the point?

A. Not directly on the upper side.

266 Q. That eddy could only affect the steamboat?

A. That is all.

Q. The tow would not be in it?

A. No, sir.

Q. Would not it, in fact, if the boat followed, of course, would be on a swing around there? Would not it be better for the tow to be close as comfortably could be in going around there?

A. No, sir; I would be rather a little afraid of it.

Q. By being further toward the east shore you think you would improve your chances and avoid the east shore?

A. Yes, sir.

Q. You have got around West Point with a tow of 50 boats? How far below West Point would your steamboat go, in your judgment, before the tow would be about straight?

A. That is owing to which way you headed your boat.

Q. I am calculating to head it right.

A. That I can't tell, exactly how far.

Q. How far would the boat go down the river from West Point before the tow would get in a straight line behind it?

A. I could not tell you.

Q. In your best judgment.

A. I could not tell that.

Q. When it was well and judiciously.

A. It would be quite a little piece. I guess sometimes would be quicker; sometimes not so quick.

Q. Just such a thing as this?

A. Sometimes the tide sets different; sometimes the first of the tide or the last of the tide.

Q. When would it be in the fore part—in October?

A. The tide varies just as much in October as it does in July.

Q. What difference does it make in towing the boats? How could you judge if the tide makes all this difference?

A. Sometimes it slacks and then it begins to run, and it don't run so fast.

Q. You mean the running of the tide, so it runs about two miles an hour. That boat with this tow at West Point, how far south in the river would the boat get before that would be in straight line with it?

267 A. It might not get straight in line at all if the tow was not made up right; there may be a kink in it.

Q. With the tow straight?

A. The last end of the tow got by Boathouse point; that about straight for a steamboat.

Q. Then about how far would the steamboat be straight below, down?

A. I think the tow ought to be straight after the steamboat by the time she got her length of the hawser and the tow below West Point, or sooner than that; probably half way.

Q. Between Boathouse and West Point?

A. No, sir; not Boathouse point; West Point.

Q. What other point?

A. I said West Point. I said after the tail end of the tow got by West Point.

Q. After you had got with your boat so as to clear West Point with the steamboat what would be your course of steering—you got your boat around?

A. Yes, sir.

Q. What would be your next course?

A. Steer then for Garrison's, or nearly there.

Q. And that would be steering to the east side of the river?

A. Yes, sir; probably below Garrison's; rather to the east.

Q. And you would keep that course how far down toward Garrison's?

A. O, I would keep that course until my tow got clear Boathouse point, and then I would head her for the middle of the river, and keep her there.

Q. By that time you would be opposite Garrison's?

A. I would be farther down than Garrison's.

Q. But you would put her in the middle of the river?

A. I can't tell; it was owing to circumstances; there might be a vessel in the way.

Q. Nothing in the way?

A. I might keep along the east shore; I might keep her in the middle; just as I took a notion.

Q. It would be right to do either way?

A. It would be nearer right to keep her in the middle.

268 Q. About how far south in a straight line, from a line extended from West Point, is it from the river? How far sourth from that line is the north point of Boathouse point, in your judgment?

A. It might be (of course I have to guess at it) between 500 and 700 feet.

Q. In going around West Point, if the tow broke before it rounded West Point, where would the piece of the tow detached from the steamboat drift to?

A. It would drift over on Boathouse point.

Q. Is not there north of Boathouse point and north of a point that is above a straight line drawn straight across the river from West Point below a low beach there?

A. Yes, sir; there is a flat there, I believe.

Q. And does not the course of the river in setting around and

going down on the north side of West Point go right over as straight as it can toward that place, this low beach, above Boathouse point?

A. How far above Boathouse point?

Q. Any distance above it. Don't it set over and go as close as it can right in the direction of that beach?

A. Right straight across from West Point?

Q. Yes, sir; north of that.

A. No, sir; it sets kind of diagonally around.

Q. If the river in setting around came from the north of West Point after having rounded Magazine point don't it go right over the current towards that bank? You know where the bank is. Don't it go right over towards the bank?

(Not answered.)

Q. I take it all the way from Boathouse point up to the turn of the river where the bank turns toward the northwest.

A. There is a circle from Boathouse point up to Magazine.

Q. And the lower part of that circle is a low bank, runs right up to the railroad track?

A. No, sir.

Q. Very close to it?

A. The water runs up to it, but the water is very shallow there.

Q. Don't the current of the river run right down in the direction of that bank?

A. Partly.

Q. And is not the current the only thing that fetches it around and gets it around West Point from that?

A. Certainly.

269 Q. Then would not the boat that broke loose above West Point strike above Boathouse point?

A. No, sir.

Q. What would prevent it?

A. The tide don't set right across the river; it sets down the river and over the river at the same time. She would have come down sideways.

Q. If she broke up above West Point she would hit Boathouse point?

A. She might up a little above.

Q. If she did she would run on the beach?

A. She might.

Q. If she broke loose exactly on the turning point, right directly opposite West Point light-house, where would, in your judgment, or the part of the tow detached go?

A. That is owing how close she is to the west shore at that time.

Q. Take your statement; the space placed to it is the 100 feet from the West Point light-house; you have your tow as near as you can right behind. When the tow part breaks right there from West Point 100 feet east of the light-house where was the detached part of the tow then?

A. I think they would go below Boathouse point or they would strike. I don't think they would strike at all if you had them in there.

Q. Do I understand you to say that you are acquainted with the shore and the depth of the water along the east side of that river from Boathouse point down to Garrison's?

A. No, sir; I am not acquainted with—I can't tell the exact depth of the water.

Q. Any idea, except guess-work, of the depth of the water down there close along by Boathouse point and down to Garrison's?

A. No, sir; I do not know how deep the water is.

Q. You have no idea whether or not there are rocks there under the water?

A. I have an idea.

Q. Do you know whether there are any or not?

A. I do not.

Q. How close have you ever sailed to Boathouse point with a tow?

270 A. I do not know. I can't tell how close. I never have been very close, to my recollection now.

Q. Have you been within 100 feet?

A. I think not; not that I remember of.

Q. Do you think that a tow would be in danger of striking anything that would travel 100 feet east of Boathouse point, and so down to Garrison's, 100 feet from the east bank?

A. If she did not get any closer.

Q. If a tow was going down out 100 feet from Boathouse point, and that distance down until you got to Garrison's, would the tow be in any danger?

A. I should think not.

Q. And you think at that time that if a rope broke that it was owing to something. A tow going straight down within 100 feet, or about 100 feet, from the east shore, and a rope broke, what would you lay it to?

A. I can't tell.

Q. Would you think that there had been mismanagement on the part of the steamer?

A. I can't say that.

Q. I understood you to say that from Boathouse point the tide goes generally to the westward?

A. Yes, sir.

Q. I understood you to say that if a boat got down or a few boats got down along by the bank of the river, on the east side there below Boathouse point, to between there and Garrison's, it would slide along the bank of the river without being hurt—loose, I mean?

A. I don't think I said so. I think I did not say so.

Q. Did not you relate something about some boats being detached from a tow setting along by the east edge of the river there south of Boathouse point and between there and Garrison's?

A. I did.

Q. What was it?

A. I said if any boat hit the rocks below Garrison's 600 feet it was towed by some boat there.

Q. Below Boathouse point you said, in some portion of your di-

rect examination, that boats would sail along there, east edge
271 of that river, and not be affected (you did not say those words), and it would keep along down by the side of the river?

Objected to.

Q. The ebb tide, then, according to you, is not altogether flowing toward the west?

A. Not at that point; there is a little eddy.

Q. Then there is an eddy, then, when you get down about 600 feet below Boathouse point?

A. I don't know as it is an eddy; it don't set to the westward.

Q. What do you know about that eddy? Had you ever sailed on that ebb tide within 100 feet of that shore? I understood you to say a little while ago you had not.

A. I guess you did not.

Q. Have you sailed within 100 feet of that shore along south of that Boathouse point, between there and Garrison's?

A. Yes, sir.

Q. You know something of the condition in the current there?

A. I know something about it.

Q. What is your experience about it?

A. I could not tell about a tide when I was coming along with a little boat or with a little propeller. I was coming 6 or 8 mile an hour. I could not tell what the tide would do that way.

Q. Tell the experience you got with the tide there within 100 feet.

A. I have seen fishing boats along there drifting.

Q. That is your experience, and within what distance of the shore?

A. Been close along the shore.

Q. Have you any experience of anything drifting ten feet from the shore?

A. O, not that I can call to mind just now.

Q. Have you any experience of anything drifting along there within 100 feet of the shore except those little boats?

A. No, sir; not on an ebb time.

Q. Any other tide?

A. Yes, sir; drifted along there on a flood tide.

Q. Then the current sets right towards it?

A. The current sets up there pretty true.

Q. Have you any other experience of the drifting of boats
272 along there — that shore on an ebb tide except that of these small boats that went right along close to the shore?

A. My experience is this——

Q. Have you any other?

A. I can't tell.

Q. I ask you if you had any experience of the effect of that tide there along between Boathouse point and Garrison's landing, except that you have seen the small boats there drifting close to the shore?

A. I have been along there with different boats all times of tides, close along there.

The COURT: Did you say that you had never been along there within 100 feet so as to know a drift of the ebb tide?

DEFENDANT'S COUNSEL: We claim the fact to be proved and by the witnesses of the plaintiff that whatever breaking was done was broke between Boathouse point and Garrison's, somewhere from between 400 feet north of Garrison's — 600 feet south of Boathouse point. We claim it as a fact that boats did drift in there, and this witness is called as an expert to show that they could not have drifted in there, and they asked him the question and he has sworn that they could not have got there unless they had been towed there.

A. I do that.

DEFENDANT'S COUNSEL: It has been that point I am asking the witness.

The COURT: The witness says this: If the rope broke or the tow-line broke as they were rounding West Point, then the boats would have struck against Boathouse point. If the tow or the rope broke after the boat had got as far as Boathouse point, then, he said, the drift of the current being to the west would have prevented them from going into this place 600 feet south; but he further says if they had got down along the shore so far below Boathouse point as to be 600 feet of Boathouse point, and there have struck, then they would have got beyond the set of the current to the west, and as the current runs evenly along that shore they would have continued along shore.

A. That is just what I have said.

273 The COURT: Now the question is whether your witnesses, your experienced boatmen, will say that after you get as far as south of Boathouse point as 600 feet whether the drift to the west would continue at that point from the shore?

The COURT: If after the boat had rounded West Point and after the boats had passed Boathouse point it had broken, then it would not have drifted to the shore, because he said from Boathouse point the current set west; and if they struck the shore 600 feet below Boathouse point they could not have got there unless they had been drawn there by the steamer, because the drift from Boathouse being to the west they would not have got in. He said if they got in so far as to touch the shore at a point 600 ft. from Boathouse, then they had got beyond the force of the current that sets to the west and kept along the shore. He has answered further to your question that he has frequently been up and down along that shore close to it. Then your next question, you assumed at some point in his examination he had said that he had not been within 100 feet; at that point Mr. Andrews interrupted him; I said I could not remember the exact expression on that point. Ask him, if you like, the question, Did you not say a short time before that you had not been with a boat as close as 100 feet to the shore?

Adjourned until morning.

FRIDAY MORNING SESSION.

Q. You was asked this question on the part of the plaintiff: Assume the Niagara with 50 boats in the tow, after having rounded West Point, supposed to have been at that time within 100 feet of the shore, west of Boathouse point, in the night time; you answered you should think it would hit. Why do you think it would hit?

A. If the tow was there, or the steamboat *or the steamboat* or what part of the tow?

274 Q. The tow you answered that you should think it would hit. Why would it hit?

THE COURT: He said if the boat had rounded West Point with 50 boats in tow, and the tow had not passed Boathouse point, then she would hit.

Q. (Stenographer reading question.) "Assume the Niagara with a tow of 50 boats to have just rounded West Point, and the tow to have been at the time within 100 feet of the opposite shore to the rocks at Boathouse point, it being an ebb tide and ordinary weather, pleasant weather, but not a dark night, what would you think of the safety of such a condition for the tow of 50 boats? (Ans.) It would be unsafe; I should think it would hit." That question was put and answered by you; how far from east of West Point did you assume the Niagara to have been?

A. I did not assume how far the Niagara had been; she was a great way below West Point; she would grow longer, hawsers out.

Q. How far did you assume the Niagara to be east of West Point?

A. I assume it to be in the middle of the river; east of the middle of the river.

Q. How far south, if anything, of West Point?

A. That I could not tell, how far south of West Point.

Q. How far south did you assume her to be when you think that had happened?

A. I assume her to be probably 1,000 feet or more.

THE COURT: If the steamer had passed West Point and the boats were opposite Boathouse point at a point 100 feet from the shore, that it would be dangerous; that is the question.

DEFENDANT'S COUNSEL: Yes.

A. It don't matter to me how far the steamboat was to me if the boats were 100 feet of the shore; that is all required about. I do not care where the Niagara was. I do not want to assume where the Niagara was, only assume where the canal-boats is.

275 Q. If the Niagara was within 150 feet of West Point and to the east of West Point, and the tow was exactly east of it, how far from the east shore was the end of that tow?

A. That is owing — how long her hawsers was.

Q. You are making an estimate of it?

A. No; I am not.

Q. You do when you estimate that the boat is a thousand feet below Boathouse point when any part of her tow can be inside the 100 feet off, would make an estimate of the length of her hawser?

A. If I know how wide the river was there, then I could tell you. If I knew exactly the width of the river and the length of the tow, I could answer the question.

Q. You can tell whether that boat was 1,000 feet below West Point—you could not tell where the boat was?

A. If the boats were 100 feet from Boathouse — whether it would be safe. All I am looking to are those boats when I answer that question; not looking to the position of the steamer.

Q. Do I understand that you mean this, that to get the tow-boats within 100 feet of Boathouse — would be unsafe in towing around it?

A. Yes, sir; if it was the head tier.

Q. Or anywhere?

A. Yes, sir; it would be unsafe for the head tier 100 feet south of Boathouse point.

Q. Have the head tier within 100 feet of the steamer?

A. That is according — how long the hawser was.

Q. How near would the steamboat have to be if she was 1,000 feet long?

A. I do not know where she was.

Q. How near would the steamboat have to be to Boathouse point?

A. The length of herself and hawsers and 100 feet added in.

Q. If her hawsers was 600 feet long, if a hundred feet added to it, and then to have the head of the tow within 100 feet of Boathouse point, the steamboat would have to be within 700 feet of the point?

A. Yes, sir.

Q. Have you any idea of the width of the river?

A. I have an idea; I never measured.

Q. How many hundred feet?

A. I should judge, right across from West Point, close to 1,700 or 1,800 feet.

276 Q. So that at that time, to be that, if it was straightened west from the east shore, the boat, to have it there, would be less than half the distance across the river towards the east—the steamboat would be less than half the distance?

A. The steamboat is way down below the point. If the tow is by Boathouse point the steamboat is way down where it is wider; it is narrower right in close by West Point.

Q. To get the steamboat with a tow of this description—to get the steamboat to allow her tow, any portion of it, or at least the head of it, to be within 100 feet, that steamboat would have to be east of the centre of the river when she rounded West Point?

A. I don't understand your question.

The COURT: To get the boats within 100 feet of Boathouse point the steamer would have to be east of the centre of the river to do that when she rounded West Point?

A. I think she would have to be near the centre or the eastward of it.

Q. If this boat, when she rounded West Point, was within 150 feet of it, was she in a proper position?

A. I should think she was.

Q. And her proper course from that would be to head in the direction from Garrison's landing?

A. Somewhere in that direction; I should think so.

Q. If she had pursued that course, where you discovered any want of care or diligence in the management of that boat in rounding that point.

A. As far as keeping the boat in its position?

Q. Yes, sir.

A. No, sir; I should think there was no want of care in that case.

Q. And if she had been there and this tow followed her, the tow could not have touched Boathouse point?

A. I should think not.

Q. Now, assuming her to have been in that position, will you tell me what course the steamer must have pursued to have drawn any portion of this tow upon any rocks on the east side of this
277 river below Boathouse point?

A. She would not touch it if she was in the same position.

Q. Being in that position, and assume that course, what course must she have pursued after that to have drawn any boat upon any rocks below Boathouse point?

A. I can't answer that in the way you want me.

Q. Assume her to have been in that position in rounding West Point and assuming her to take the course, how much over towards Garrison's must she have been to have drawn any portion of that tow upon any shore or rocks south of Boathouse point?

A. They could have sailed down and let her drift down Boathouse point before starting afterward; let the tow drift and then start her, and then haul her across, over to the east.

Q. Then you assume if she was in that condition, that, you say, would be a drift to the east of that tow below Boathouse point?

A. Not below Boathouse point.

Q. Just explain, with that tow left drifting as she rounded West Point with the steamboat steering towards Garrison's and in that direction left drifting, how that drift would have drifted across this ebb and current, which you say went to the west.

A. I did not say went to the west after she got to Boathouse point.

Q. You said she could not hit Boathouse point?

A. When the steamboat gets around West Point, but the minute she comes to get the bow of the boat is to West Point you stopped her and let her drift.

Q. My question assumed the particular position of the boat; then you replied, I assume that the boat—that the rounding West Point—cannot be within 150 feet of the point.

A. Yes, sir.

Q. You say that cannot be?

A. No; I do not say that can't be.

Q. I say I assume that boat rounded West Point within 150 feet off, and started off with the head of the boat from there after rounding it towards Garrison's; what, except stopping the boat and letting it drift, could have in anywise drawn the boats towards the east shore?

A. If she had kept that course she could not go to the east shore.

278 The COURT: What short of stopping the steamboat and permitting the boats to drift would have sent them?

A. Nothing that I know of.

Q. After she had rounded West Point and started on her course with the tow and had stopped the boat, would not the drift to the west there prevent any collision of that tow with the east shore below Boathouse point?

A. They would drift to Boathouse point—not if she had stopped—not to Boathouse point, but below Boathouse; after they had drifted to Boathouse point, then they would go to the westward.

The COURT: I understand the witness swore yesterday if the boats had been allowed to drift after they had passed Boathouse point, then they would not have drifted over 600 feet below Boathouse point?

A. No, sir; not to the eastward; I say the same thing now, if she had stopped as soon as they struck this point that lays around Boathouse they would go to the westward.

Q. Now, should have the boat up near West Point—rounding West Point?

A. They would do the same thing if the Niagara stopped where you spoke of. If she had that course, and just she got around West Point and she had stopped, they would have done the same thing, drifted to Boathouse point and then again to the westward.

The COURT: The theory of this witness is this: Prior to reaching Boathouse point, on the way down, the drift is towards the point; the moment you get to the point or a little below, then the drift is to the east.

A. To the westward; they won't go to the east.

The COURT: Therefore the theory of the witness is that if the tow had broken before they had passed Boathouse point, then they would have struck on Boathouse point; if the tow broke after the tow had reached Boathouse point, then the drift would have been to the west and not over to the east shore?

A. That is it exactly.

Q. Will you tell me what makes the current and the water in that river and which way the current is of the water in that river

279 along the shore directly south of Boathouse point after they commence 600 feet—which way is the current there?

A. It runs right straight along down.

Q. No; directly from below Boathouse point for the space of 600 feet south, which way is the current of the water that is there?

A. It runs down the river.

Q. Then, now, you say there is a current that runs down the river immediately below Boathouse point?

A. O, no; I do not say immediately below.

Q. 4 or 5 feet?

A. I do not know how far exactly. I could not state just to an inch.

Q. Is there anything there to cause the water along the shore right below Boathouse point to go to the west?

A. Nothing below it to cause it to go to the west.

Q. Is not there something all the while pressing and causing that to go to the east towards the shore?

A. No, sir.

Q. Does not that current that goes off to the southwest from Boathouse point force the water that is east of it to find its level and flow towards the east?

A. I don't know what the water forces it to do.

Q. Water must find its level?

A. Yes, sir.

Q. The water on the southeasterly side of this current that goes west you would naturally suppose go out in that current was a little higher?

A. What makes the tide ebb and flow, anyway?

Q. This is not tide; this is the current of the river, and its water has got to find its level.

A. It has not got to find its level; it is always setting down.

Q. If it had its level it would be stationary and never stir?

A. No, sir; that is not so. I have seen the water level on the lake and yet raise and fall on the lake, according as the wind blowed it up.

Q. You said in some portion of your examination, as I understood, it was the company of this defendant to hire as cheap men as they can get?

Objected to; such a statement.

The COURT: He was speaking of the custom of the owners of canal-boats and barges; even that I do think is legitimate.

280 Q. When you said in substance, referring to the defendants, that they say, and in speaking of barges going without captain or commanders, when you said if they say "go on without captain," whom do you refer to as "they"?

Objected to; assuming that the witness so stated.

The COURT: I don't remember if the witness did so state. I don't remember exactly what the language of the witness was at that point.

PLAINTIFF'S COUNSEL: I will waive the question.

A. I do not say barges, I said boat.

The COURT: Whom did you mean by the expression "they"?

A. I mean in Schuyler's line.

Q. What boats?

A. I can't tell what steamboat it was. I was in the Winants, not Capt. Cunningham; there was some canal-boats—captains that was not there—and the tow was ready to go, secured at the dock. I said, "Will they go on?" and he yelled, "Go on without them."

Q. You don't know who said it?

A. No, sir; somebody on the deck; they had somebody there. I

think it was Mr. Kemble that was spoken and the captain of the steamboat. Some one said, "The captains of the boats are not here." "Well, never mind what captain of the boats; go on with the tow," and he winded off and went on.

Q. To a boat in charge of a tow?

A. Not one boat in particular; several ashore of the captains.

Q. What captains were ashore?

A. Captains of canal-boats.

Q. When was that?

A. I don't know how long; it is a good while ago; when I was in the Winants.

Q. How long ago was that?

A. I can't tell. I don't remember how long ago it was.

Q. Five years?

A. Yes, sir; longer than that.

Q. Five years?

A. I should think longer than that.

Q. Ten years?

A. I won't undertake to go beyond 10 years; it might have been longer than that. I can't give any idea any further than that.

Q. Do you think it could be 15 or 18 years?

A. I have answered the question.

281 Q. Was it before or after the last war?

A. I have answered the question.

Q. In your judgment, was it since the war of the rebellion commenced?

A. I have answered the question.

Q. You testified that oftentimes they do not ask whether the captain is aboard; give me an instance when a captain of Schuyler's boats at any time since the commencement of the war of the rebellion you know did not ask whether the captain was on board.

A. I don't know that such a thing ever occurring at all in Schuyler's line.

Q. Then you don't refer to the defendant at all?

A. No, sir; not in that case.

Q. You said if you were drifting in this tow you would not anchor, because the tide runs at least two miles an hour and in less than three minutes you would drift way down so that you would be in no danger of the shore.

Objected to by plaintiff's counsel.

The COURT: I do not think that is hardly a fair statement of the witness' statement.

Q. You said you would not anchor, or could not anchor, because the tide in that place runs at two miles an hour; did you say that?

A. No, sir; I did not say I could not.

The COURT: He did say the force of the current was about two miles an hour, and, assuming the boat to be a certain distance from the shore when the break came, by the force of the current the boats would strike the shore before the anchor could be heaved overboard,

if this did strike the shore; if not, they would drift beyond that point. Defendant's exception as not being the statement of the testimony of the witness, according to my judgment.

Q. Did you not give one reason for not anchoring that it would be assuming a responsibility?

A. I did.

Q. What did you mean by that?

A. I meant if I cast off there from that tow, and could possibly, if it was possible to, get my anchor down, which I do not think I could, and hit the rocks, she would swing around and anchor
282 jerk her; she would cant toward the shore and hit the rocks; she would hit them with more force, those other boats drifting by—drifting by with her; they would say, "You have cast off; if you had stayed with the other boats there would be no damage."

Q. So it was to avoid an action for the probable loss of the boat?

A. If I owned the boat, yes, sir; that would be one reason.

Q. How far is Boathouse point, in feet or miles, north of Garrison's landing?

A. That I could not say.

Q. In your judgment.

A. It might be three-fourths of a mile, more or less.

Q. What do you think it is?

A. I have told you.

Q. Do you think it is three-fourths of a mile?

A. Yes, sir; more or less.

The COURT: Your best judgment is about three-fourths?

A. I should think so.

Q. How far is it from Garrison's to the chemical works?

A. I could not tell you.

Q. In your judgment.

A. It might be two miles and a half; it might be three miles; somewhere along there, between two and three miles; that is as near as I can give it.

Q. How far is Magazine point from West Point?

A. West Point light-house?

Q. Yes, sir.

A. O, it is hard to judge the distance on the water; it may be a half mile; it may be three-fourths.

Q. What is your best judgment?

A. I should judge not far from a half mile.

Q. Does the current of the river cease to go to the west below Boathouse point?

A. How far below, do you mean, does it cease to go to the west?

Q. Until below, do you mean, Boathouse point?

A. Yes, sir; way down to Rockland lake.

Q. Does it cease to go to the west before you get there?

A. Yes, sir.

Q. How far below Boathouse point does it cease to go to the west?

A. At the time you got to Cozzens' dock.

283 Q. How far is he below Boathouse point?

A. It may be a mile and a half.

Q. How far below Boathouse point does it begin to go to the west?

A. Right directly at Boathouse point.

Q. And that is so, irrespective of tide?

A. It don't do so on the flood tide.

Q. It does so all the while on ebb tide?

A. There may be the last of the tide, when the tide is slack; about the very last end it may not.

Q. And the wind have any effect upon it?

A. I should judge it would have if it blowed heavy.

Q. How, in making the estimates in regard to the transactions around Boathouse point, did you estimate the ebb tide?

A. I estimated the tide near the middle of the tide.

Q. It would be less or greater as it was before or after the middle?

A. There is not much difference in the tide for four hours along the centre of the tide; tide lasts six hours, sometimes seven.

Q. What condition of the wind did you take into consideration?

A. I did not consider there was any wind.

Q. Do you mean to say that the tide next to the shore on the east side is as much as three or four hundred feet south of Boathouse point—sets to the west in ebb tide—full ebb tide?

A. No, sir; not close in. I mean it sets true after you get 500 or 600 feet.

Q. For about three or four hundred feet it don't set close in in full ebb tide. How near Boathouse point would that tide be that did go west? How near the shore three or four hundred feet south of Boathouse point?

A. I can't tell that exactly.

Q. In your judgment.

A. That is a pretty hard point to have any judgment on, how close.

Q. Best judgment.

A. I think you would have to be, probably, if you was 75 feet off from the shore.

Q. And as you went still further south—that is, for a reasonable distance—I should think the point where this current went west would be the width of it from the shore increase?

A. Increase which way?

284 Q. From the east there.

A. I don't koow how much it would increase.

The COURT: That is to say, you mean further south you go the less current there would be to the westward in the river?

A. Yes, sir; less further south you went setting to the westward.

Q. Then the space between this current that goes to the west and the east shore would be continually growing wider as you go south for a reasonable distance after you get this point 3 or 4 hundred feet where you think the width of it would be 75 feet on the start?

—. ——.

Redirect examination.

By Mr. ANDREWS:

Q. You have always lived in the neighborhood of Albany?
A. Castleton, Albany, and Troy.

Mr. FROTHINGHAM: I move to strike out the testimony of this witness, the evidence as to the probable place where the plaintiff's boat struck, and the probable cause of its striking, on the ground that it is not a matter within the scope of expert testimony. His opinion was founded upon positions of the boat too uncertain for the witness in determining upon the exact direction of the wind, which was not proven; from the exact flow of the tide; upon their force in reference to the time they had been ebbing; upon the exact distance from the place of the alleged striking of the boat and the place it is alleged it was found, and upon other uncertainties; and also because it is incompetent for plaintiff to prove by this character of evidence a theory in contradiction of a fact established by his own witnesses.

The COURT: I must decline to strike that out.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I make the same motion upon the same grounds in reference to the witnesses' testimony in reference to the subject of anchoring.

285 The COURT: It is for the jury to say upon all those questions upon which your objection is founded.

Exception by defendant's counsel.

The COURT: In doing so I do not mean in the least to decide how much weight this species of evidence may be entitled to as against the positive evidence as to the breaking of the lines, and also to the fact which I see in the stipulation to arbitrate the cause of the accident. It is for the jury to say how much reliance must be placed upon the evidence of the witness owing to the uncertainties attending the hypothesis upon which he was asked the questions, and also in regard to the positive testimony given by witnesses as to the breaking of the lines and the statement in the agreement to refer; that she drifted against the rocks.

THEODORE BRIGGS sworn for plaintiff:

Examined by Mr. CADY:

Q. Business?
A. Steamboating.
Q. Whereabouts are you now employed?
A. Hoboken ferry.
Q. In what capacity?
A. Pilot.
Q. Have you ever been engaged on the North river?
A. I have.
Q. In what capacities?

A. Mate, deck hand.
Q. Mate of what?
A. Steamboat.
Q. Steamboat engaged in towing?
A. Yes, sir.
Q. In what line?
A. Schuyler's.
Q. How long have you had experience on the North river in towing?
A. I was mate about 8 years.
Q. Had you ever had any other experience in towing outside of that eight years?
A. No more than I have been pilot for a short time on a towboat.
Q. What boats were you mate on?
A. On the steamboats Belle, Syracuse, Austin, on the North river.
Q. Are you familiar with West Point?
A. Yes, sir.
Q. Have you ever been a pilot on tows going around West Point?
A. I was about 3 months.
286 Q. Do you know the steamboat Niagara?
A. Yes, sir.
Q. Are you familiar with the process known among boatmen as springing the hawser?
A. Yes, sir.
Q. Knowing the Niagara as you do and having the experience which you have stated, could the Niagara, in your opinion, take a tow of from 40 to 60 boats around West Point on a clear night and ebb tide and no great amount of wind blowing in safety if the hawser had been sprung?
A. Yes, sir; I should say she could.
Q. Have you ever anchored off West Point?
A. No, sir.
Q. In your opinion could the Niagara, with such a tow as I have mentioned and on such a night as I have mentioned, kept the towboats or boats in her tow further to the west than 100 feet from the rocks at Boathouse point if the hawser had been sprung?
A. Yes, sir; I should say she could.
Q. Have you ever anchored off West Point?
A. No, sir.
Q. Assume yourself to be on the port barge of the last tier in a tow of boats having just rounded West Point or just about rounding West Point; you find yourself at or a little after midnight within such a distance of the shore that you could jump from the boat to the rocks. Would it, in your opinion, be good judgment to cast your boat loose from the tow and cast anchor?
A. I should not have done it; no, sir.
Q. Do you think it would be good judgment to have done it?
A. I do not.
Q. Would it have been good judgment, in your opinion, if you

had found yourself in such a position, to put a fender over the side of the boat?

A. Certainly; that is what they are made for.

Q. What is the purpose of doing so?

A. To keep the boat off the dock or rocks, wherever she may happen to be.

Q. And that is frequently done by boatmen?

A. Yes, sir.

287 Q. In your judgment or in your opinion, the boat having struck the rocks, and a hole having been knocked in her bottom, was it good judgment to raise a hatch and endeavor to find out where the hole was in the bottom of the boat?

A. That is what I should have done.

Q. And having done so would it be, in your opinion, good judgment to put a canvas over the outside of the boat to stop the leak?

A. Yes, sir.

Q. After having done that would it have been good judgment to pump the water out which had already flowed in?

A. Yes, sir.

Q. After having done that, would it or not be good judgment to cut away the ceiling on the inside of the boat to get at this leak?

A. Yes, sir.

Q. What else would you have done if you had found yourself in such a position that night than to do what I have mentioned?

A. I do not know of anything I could have done.

Q. Does anything else occur to you as a boatman that could have been done?

A. No, sir.

Q. Assume that on such a night I have described, and at the time of midnight or a little after, you, being on the port boat of the rear tier of the tow, had found yourself within 100 or 200 feet of the shore, would it, in your judgment, with the tow parted (assuming the tow had parted), have been good seamanship to cast loose from the tow and cast your anchor?

A. No, sir; I never should leave the tow without I had steam or sail.

Q. Why would not it have been good policy?

A. I should calculate I took the responsibility in my own hands to do it; I should calculate, when I vacated the tow, that Schuyler was clear from me.

Q. What should you say in danger of striking the rocks with more force if you had stopped your boat on an ebb tide, so she would be swept to the rocks by putting out the anchor?

A. She would have to swing faster, the tide pressing on the west side; I think she would have to swing faster.

288 Q. What do you say as to the ability of two or three men in a small boat to pull a barge loaded with 127,000 brick in the night against an ebb tide off West Point?

A. They can't hold her.

Q. Go without steering her; could they steer her?

A. Steer her sternwise; she would go sternforemost.

Q. They could not pull her, in your judgment?

A. No, sir.

Q. Do you know anything about the number of men that they usually have in crews in barges and canal-boats in tows on the Hudson river?

A. I have run a barge of 500 or 600 with one man.

Q. How many men?

A. Two alone; captain and cook; those that do not carry families with them.

Q. Some captains go along with their families?

A. I have been alone with a 500-ton barge.

Q. Is not it a fact that a good many captains go up and down the river with their families without having one man on the boat?

A. Yes, sir.

Q. If there are more than two or three men what are they employed for?

A. There are a great many employed. I have seen Captain Salisbury have four extra men to unload; unload cheaper.

Q. Have you ever known of boats going up and down the river in tows without their captains?

A. I have.

Q. Known it many times?

A. Yes, sir; I have been deck hand in the boat—no other captain been aboard of her—dozen trips during the season; took charge of her myself.

Q. You know how the water on an ebb tide what direction it sets around West Point?

A. Yes, sir; I think I do.

Q. What direction does it?

A. Sets to the eastward.

Q. Toward Boathouse point?

A. About southeast.

Q. Do you know anything about the tide; the direction of the tide on an ebb tide below Boathouse point?

A. It hangs off the shore; sets off the east shore towards the southwesterly side.

289 Q. Is not the fact that the tide flows a southeasterly direction after it passes West Point, strikes Boathouse point and bounds off to the west? State the direction of the tide from the time it leaves West Point until it reaches——

A. It sets, near as I can get at it, about southeast, towards Boathouse point.

Q. Then what direction?

A. Then sets off.

Q. South or southwest?

A. A little to the westward.

Cross-examination.

By Mr. FROTHINGHAM:

Q. About where does it commence setting over to the west?

A. At Boathouse point. It strikes Boathouse point and sets off.

Q. About how far below?

A. About on Boathouse point.

Q. Sets off immediately from the shore?

A. It sets off when it strikes there.

Q. Does not it depend upon the condition of the tide—the first of the ebb or the last of the ebb or the middle?

A. Of course that makes a difference.

Q. Do you know the exact point there where it sets off to the west?

A. No, sir.

Q. Can you tell within 300 or 400 feet?

A. Yes, sir.

Q. Tell us the exact point.

A. Boathouse point.

Q. Right there?

A. Right there.

Q. And how far from the shore does it commence setting off?

A. I have seen the ripples, seen it run on the point. I mean the westerly current; there is no easterly current.

Q. There is an easterly current on ebb tide over towards Boathouse point from West Point?

A. Yes, sir; from West Point.

Q. From West Point towards Boathouse point?

A. Toward Boathouse point above West Point. It can't run right straight across.

Q. It runs in that direction?

A. Yes, sir.

Q. Does it depend somewhat upon the wind?

A. Wind helps the tide; makes it run stronger.

290 Q. These boats in these tows have been frequently left to take care of themselves in the river alone?

A. Not that I know of.

Q. In case of a storm, in case of breaking apart from the tow?

A. Vacate your barge, leave it, do you mean?

Q. In case of breaking apart of the tow or in case of a storm—in case of any accident—are they not left to take care of themselves in the river without the steamboat? Don't they sometimes break up in the river?

A. I have seen them break up; not there.

Q. Anywhere on the river?

A. Yes, sir.

Q. The boats are left to take care of themselves?

A. They would break too; they had a helper to help us.

Q. In case you did not have a helper to help you?

A. But we never had that misfortune.

Q. Have you ever heard of tows breaking up?

A. Yes, sir; I have heard of the America breaking.

Q. In such an emergency would you deem it prudent for the owners of the boat to have no navigators on board of her?

A. Such a class of vessel they are not required.

Q. In such an emergency would you deem it prudent that such a vessel should not have on board her experienced navigator?

A. No further than to let his anchor to go, if it was a proper place; look for his water.

Q. You would not regard it desirable under those circumstances to have an experienced navigator aboard?

A. Any further than that.

Q. All you would want would be some one to know enough to let the anchor go?

A. Keep up the lights, look out for the water in his boats; that is all could be done with her. He is powerless; no steamboat or sail. She had steam and had sail, of course she would want experienced men.

Q. Why would you regard it of no consequence? Would it be because you say you would desire the responsibility upon the towboat?

The COURT: He says the reason of it is that is all could be done.

291 The COURT: You have stated to me all that you would need under such circumstances would be men who knew enough to cast an anchor, put out the lights, and use the pumps. Now, the question is he asks you, in answering the question you do, would you also take into account the fact that you wanted the responsibility to rest with the owner of the steamboat?

A. Why, certainly. For the break in the tow?

Q. Yes, sir.

A. Certainly.

Q. Is that one of the reasons why you would not desire the captain aboard?

A. Yes, sir; that is all the captain could do.

Q. If you should find yourself adrift in about the middle of the river, would you not endeavor to anchor if the tow should be broken up; you should find yourself adrift in the middle of the river, would not you endeavor to anchor?

A. That would be owing to circumstances.

Q. What circumstances?

A. What part of the river you are in.

Q. Would you want to have an experienced person present to determine those circumstances?

A. Any man can tell where they are rocks.

Q. On the bottom?

A. No, sir.

Q. I am asking you about the middle of the river. If you were broken apart in the middle of the river, I asked you about anchoring.

A. No, sir; I would not have done that.

Q. You would not undertake to anchor?

A. No, sir; because I would not have vacated the tow; I would hold on them.

Q. Why?

A. Because I take my own responsibility when I do it; anything happens to that boat after I let go the captain of the steamboat is clear from me.

Q. That is the reason why you would not?

A. That is one reason; yes, sir.

Q. Is that the reason why you would let your boat without an experienced navigator aboard of her, the responsibility of the towing company; is that one of the reasons why you should let your
292 boat go to New York without a captain?

A. No, sir; they are captains of a boat when they get her; they got charge of the boat, the captain of the steamboat.

Q. Is that your reason for it why you would not take charge of her then yourself?

A. I do take charge of her in one respect.

Q. Is that one reason why you would not desire to take charge of her yourself, because they are captain of her?

A. In one sense of the word I do.

Q. What is the usual crew on board of one of these barges like the John T. Lee?

A. Two men.

Q. And a captain?

A. No, sir; two men is a crew; as many as I want; myself and cook would be all I want; that is all that is required.

Q. Suppose that, while in a tow being towed to New York, you are desirous of landing your boat at an intermediate place; how is it done?

A. They take a boat, put us off, take us where we want to go.

Q. Suppose you are being towed down the river, you wanted to be landed at Newburgh or any other place, how would you land?

A. Have to drop off.

Q. Drop off on a line?

A. They would have to.

Q. Do you sometimes take a boat and take a line ashore?

A. No, sir; I never seen it done.

Q. How do they drop off?

A. Drop off on a line.

Q. Then they steer this into the dock?

A. Yes, sir.

Q. Such a case as that, would you leave that to a person that did not understand navigating?

A. I would not leave it to a man that did not know nothing.

Q. Would you leave it in charge of a person who did not know anything about navigating under those circumstances?

A. I have said as near as I could; I would leave it with a man that knew how to put his wheel.

Q. Would you, under those circumstances, leave it to a person that did not understand navigating—did not understand the river?

A. Yes, sir.

Q. Did you ever know of an instance where a boat was left
293 in the middle of the river to take care of herself where she had no captain aboard?

A. I can't say that I do.

Q. In your judgment, would not it have been a prudent thing if your boat had sprung aleak to stop the leak?

A. Yes, sir.

Q. Would not it be a prudent thing to put a pillow or comforter or something of that kind?

A. Yes, sir.

Q. Would not you regard it prudent and proper to fasten that in position?

A. Yes, sir; if you could.

Q. Don't you think it would have been imprudent not to have fastened it if you could?

A. Yes, sir; if you could.

Q. You would have fastened a canvas over the bow if you could—over the hole?

A. Which side of the hole?

Q. Outside.

A. It would be impossible to nail it over the hole outside.

Q. I said fasten it; no other way of fastening instead of nailing?

A. No other way; the suction of the water under the bow keep her head straight.

Q. They would have a tendency to keep it in place. Would not you fasten it? You could not fasten it any way?

A. You could take lines and fasten each end?

Q. You would have fastened it securely?

A. I would if I could.

Q. Would there be any difficulty in fastening it securely under the corners of a canvas put under a bow?

A. I should think it could.

Q. Why?

A. You could not draw it tight enough?

Q. Suppose you had drawn it tight enough?

A. I would draw it so it would not leak.

Q. You are not interested in this case?

A. No, sir.

Q. Suppose you had drawn it tight so as to secure the boat from leaking, so you could pump the water out of it, could not you fasten them so it remained there?

A. That is more than I could tell; that is all I could do—put the canvas over the bow and leave it.

Q. Leave it without fastening it?

A. Do the best you could with it.

Q. Answer my question.

A. Do the best you could.

294 Q. What is the best you could do about fastening it outside?

A. Drop it under the bow and let the pressure of the water take it under the bottom, and the suction of the water comes through that hole.

Q. Would you leave it entirely to the suction of the water?

A. I could do nothing else; I could not get no other to fasten it.

Q. Could you fasten it on the side?

A. No more than to get around with ropes.

Q. You could fasten it on the deck?

A. Fasten the lines; you could drop it with lines on the end.

Q. You fasten those lines securely?

A. I never had that experience, but I think that is the only way it could have been done.

Q. Tied securely, is there any way that the canvas could have got off?

A. I do not know. I think by turning a boat to pull her around the pressure of that water coming in between the canvas and the boat would rip it loose.

Q. Suppose after you got turned around it was all right?

A. If you could get it there some way securely, why, of course, you could keep the water out.

Q. Under those circumstances by throwing aside from your mind this responsibility, if you wanted to put it upon the towing company, would not you like to have an experienced person there to do that?

A. No, sir; it did not need no one.

Q. Throwing aside this responsibility?

A. Any man would know that—that is, if he was aboard of a boat.

Q. I thought you said a little while ago you would not?

A. Any man that was ever on a boat would know enough for that. It don't take long to learn such things.

Q. Don't take long to learn to put a canvas under a boat?

A. A man — has got any judgment ought to know enough to do that. I never done that. I could do that.

Q. Did not the counsel ask you for a navigator to do that, for any person prudent not to do?

A. It is probable.

295 Q. Then you now say anybody could have done that?

A. Any man that ever was on a boat.

Q. What do you mean by a qualification—"that was ever on a boat"?

A. A man that don't require; why, any man with any judgment at all about him. I think you take a man that never was on a boat would know enough to do that.

Q. What do you mean by a qualification—any man that ever was on a boat?

A. Ever sailed on a boat; ever employed on a boat.

Q. Why do you think that was necessary to know—how to put this canvas there? Why do you make that calculation?

A. Nothing particular about.

Q. If a boat, being under headway, should be anchored, would she then, in your opinion, go any faster than she did before?

A. Her stern would go around faster.

Q. That is your opinion?

A. I know it by experience; got the whole force of the tide on her side to swing her.
Q. Are you related to this plaintiff?
A. I am a son-in-law of him.

Redirect examination.

By Mr. ANDREWS:

Q. You are not employed on the Schuyler line?
A. No, sir.
Q. You know the John T. Lee?
A. Yes, sir.
Q. Navigated her?
A. Yes, sir.
Q. Carry bricks on her?
A. Yes, sir.
Q. How many bricks carried on her?
A. I won a new pair of boots on 134,000 bricks.
Q. How did she stand up on that load?
A. Stood up all right.
Q. Where did you carry that load?
A. Gowanus creek; started from Catskill creek, going in the tow.

Recross-examination.

By Mr. FROTHINGHAM:

Q. Who was aboard then?
A. I was aboard of her.
Q. Alone?
A. No, sir.
296 Q. Who was aboard of that boat?
A. I was aboard of her myself.
Q. Who else?
A. I could not tell you.
Q. When was that?
A. That I could not tell you—what year.
Q. Give us an idea.
A. I was in her in 1868.
Q. Is that the time you carried the brick, in 1868?
A. I could not say.
Q. Is that as near as you can come to it?
A. That time; yes, sir.
Q. Were you captain of her?
A. No, sir.
Q. Who was captain?
A. Salisbury.
Q. What capacity were you acting?
A. As hand.
Q. Who was acting as cook?
A. I think his name was Rigley; captain did not travel with us.
The COURT: Was he with you at that time?

A. I don't think he was; very seldom ever went down with us or came up with us.
Q. Then who had command of that boat at that time?
A. I did.
Q. You are a pretty capable navigator?
A. No great; no, sir; been to New York a few times.
Q. How many years had you then been navigating the river?
A. I think it was in 1868.
Q. Was that your first experience of a vessel?
A. No, sir.
The COURT: How long had you been steamboating in 1868?
A. My first steamboat was——
The COURT: Or boat?
A. It was not a sail vessel.
The COURT: When?
A. Sailed a craft when I was about 14 years old. I am 45 years old next spring.
Q. You have been navigating about 31 years?
A. About 30 years, I calculate.
Q. Then in 1868 you are a pretty experienced navigator?
A. No.
Q. When did you become an experienced navigator?
A. I do not call myself any great navigator now.

297 Redirect examination.

By Mr. CADY:

Q. You said when tows had broken loose there had been helpers along to help pick them up?
A. Helper is a small steamboat owned by the steamboat company.
Q. What she does?
A. She places the boats in a tow that are scattered around the river.
Q. Takes boats out of the tow?
A. Yes, sir.
Q. When boats break loose from the tow what does the helper do?
A. If they have one with them they pick them up.
Q. Are helpers used in the vicinity of West Point?
A. Not when I was.

THOMAS BRIGGS sworn for the plaintiff.

Examined by Mr. ANDREWS:

Q. Where do you live?
A. Athens.
Q. How long have you resided there?
A. Forty-nine years next September.
Q. That is about your age?
A. Yes, sir.
Q. Have you had any experience in boating on the Hudson river?
A. Yes, sir; some.

Q. When did you begin that?
A. When I was 14 years old.
Q. In what capacities have you followed boating, Hudson river?
A. I went cook on a sloop when I was 14 years old.
Q. What other positions have you held?
A. I was 18 years old; I boarded a sloap and carried coal from Kingston to Hudson.
Q. What other place?
A. I had her two or three years, and I bought a brick sloop; sailed her from Athens and Coxsackie to New York; I guess I had her six years.
Q. What other?
A. And then I went steamboating.
Q. When did you begin there?
A. About 1859.
Q. In what capacity?
A. Captain and pilot.
Q. And sailing from what points to what points?
A. I was around the harbor of New York for five or six years.
298 Q. Any part of your business been acting as officer on steamboats, towing barges and canal-boats up and down the river?
A. Yes, sir.
Q. Did you know the steamboat Niagara?
A. Yes, sir.
Q. How have you known her—in what capacity?
A. I have known her by seeing her.
Q. Did you know the barge John T. Lee?
A. Yes, sir.
Q. You have been accustomed to take tows in tow of the vessels that you was captain or pilot or mate, up and past West Point?
A. Yes, sir.
Q. What is the ordinary practice in towing 50 canal-boats down the river at ebb tide, around West Point, in respect to springing the hawser?

Objected to as immaterial and improper.
The COURT: Overruled.
Exception by defendant's counsel.

A. I only know from the experience I had on the boat I was master of; I was in the Austin one year; she would not go around.

Objected to.

The COURT: The question is, what is the practice in towing 50 canal-boats around West Point on a- ebb tide in respect to springing a hawser?
A. I only know from the boat I was in that she never went around without springing the hawser.
Q. What do you say—what has been your practice?

Objected to as improper.

The COURT: I think it is competent to show what his practice was.

Objected to by defendant's counsel; his practice is not at all binding upon the defendant. Overruled. Exception by defense.

A. I never was on any large boat of the Austin.

Q. You are acquainted with the channel along there?

A. Yes, sir.

Q. What do you regard as the proper practice of steamers of the description of the Niagara, with tows of 50 boats, in passing
299 around West Point at ebb tide in respect to springing the hawser? What is the proper practice, in your judgment as a navigator; what—is it proper to spring it, in your judgment?

A. I should think it was.

Q. What would you think in case a tow coming around West Point or shortly afterward should break apart; what would you think would be the proper course in respect to the John T. Lee, if she was in the last tier of vessels and on the port side; what would be the proper course of the men on board of her? I will assume that she was 100 feet from the east shore. For this purpose I will assume that she was near Boathouse, drifting towards Boathouse point and 100 feet from the shore, attached to 35 other boats, all broken off, and she in the last tier, port side, ebb tide?

A. I should not let go.

Q. Stick to the tow?

A. Under those circumstances; yes, sir.

Q. Would you anchor or not?

A. No, sir; I would not anchor.

Q. Why would not you anchor or try to anchor?

A. That condition of the tow. I should think they were too near to undertake to let go of her lines and anchor or try to anchor.

Q. What is the object of springing the hawser in going around West Point?

A. It is to head the boat off to the westward, so as to pull your tow clear from Boathouse point.

Q. And what is the danger if the hawser is not sprung from failing to do so in ebb tide?

A. The boat going around West Point with a tow, they heave their wheel, she comes up, and the hawsers across the stern, she won't come to the westward (her rudder); then they put a spring on the hawser and head the boat to the westward to pull the tow out to keep it in the middle of the river.

Q. What is the danger, if any, in case the hawser is not sprung?

A. Go ashore.

Q. Go ashore where?

A. On Boathouse point.

Q. Which way does the tide run—ebb tide—after you get to Boathouse point?

A. The ebb tide strikes Boathouse point; goes to the westward over to Cozzen's.

300 Q. In case this same tow as that I have spoken of, take the whole 50 boats, and having past West Point below Boathouse

point, they — afoul of rocks there, tow does; it run afoul of rocks about 600 feet below Boathouse point; first one boat strikes, the boat about the fifth tier, fourth tier, or fifth tier strikes first on the rocks or on something that is supposed to be the rocks, so as to throw her out of the water. Shortly afterward the boat, or last boat, or the port boat on the last tier strikes a rock at that point so as to knock a hole in her. What should you say was the cause of that having occurred?

A. The last boat, 600 feet below Boathouse point?

Q. Yes, sir.

Objected to by defendant's counsel as incompetent upon the same reasons I moved to strike out the evidence. Exception by defendant's counsel.

A. I do not know how I can answer it.

The COURT: Suppose the steamboat has got past the turn at West Point and the tow comes in contact with the rocks some distance below Boathouse point; first a boat some tiers in advance of the last tier striking the rocks and striking it so hard as to partly come out of the water, and then, lastly, the port boat in the last tier strikes the rocks with such force as to strike a hole in her, about 600 feet from Boathouse point. To what would you attribute, under those circumstances, such striking?

Same objection by defendant's counsel. Overruled. Exception.

The COURT: That the exact point of the striking of the first boat is located in the question before the striking of the last boat, to wit, the boat on the port side of the last tier is located as being about 600 feet south of Boathouse point?

A. I don't think she could have got there without being towed there. I don't believe they would drift there. If the steamboat got too far down in the eastward, kept pulling and trying to pull, she might have pulled that tow in there below Boathouse.

301 Q. Suppose in such a case the fact was that the hawser was not sprung, how do you think the matter would have been affected if the hawser had been sprung? If in that case the hawser was not sprung what would have been the effect if the hawser had been sprung, if she would have gone on the rocks that she went upon—what effect the springing of the hawser would have had in respect to her going upon the rocks?

A. To get the steamboat in position to draw.

Q. You have said in answer to my last question that you thought that she could not have got there—that is, on the rocks—without being towed there?

A. No; not 600 feet.

Q. I will take it for granted that at this time when she got on the rocks by being towed there, as you said, the hawser was not sprung, then how would she get off on the rocks, in your judgment, if the hawser had been used properly in rounding West Point?

A. No, sir; if she had been kept in the proper position she could not have got there.

Judge McClellan: If the boat had been kept there?

A. Yes, sir.

Q. Have you heard the testimony of the manner these young men managed this boat after they discovered they were near the rocks?

A. Yes, sir.

Q. In regard to the rest of their management, what do you say as to its having been well done and properly done?

A. I should judge from the evidence that they done well.

Defendant's Counsel: I move to strike out that answer on the ground that the question was improper.

The Court: Of course, if you insist upon the objection, I must strike it out.

The Court: That in consequence of the suggestion of defendant's counsel that they have a witness here who must leave with a tow the evidence of the present witness is suspended for the purpose of taking his evidence.

(For the resumption of Thos. Briggs' evidence see page 421.)

302 John D. Silliman sworn for defence.

Examined by Mr. Frothingham:

Q. What is your business?

A. Steamboating.

Q. Are you captain of a steamer?

A. Yes, sir.

Q. What steamer?

A. Syracuse.

Q. Is she engaged in towing on the Hudson?

A. Yes, sir.

Q. Do you know the steamer Niagara?

A. Yes, sir.

Q. How long have you been a navigator of the Hudson?

A. Albany to New York, ten years.

Q. Been captain how long?

A. About that time.

Q. Been a pilot also?

A. Yes, sir.

Q. If the steamboat Niagara was going around West Point with a tow of fifty boats upon an ebb tide, in your opinion would there be a necessity for springing the hawser?

A. I don't think there would; not in all cases.

Q. What is the object of springing the hawser?

A. She has to get them straightened down as soon as possible to get in shape.

Q. How often is that done?

A. It is not done on any of them at all in the course of a season.

Q. Rare occurrence they spring the hawser?

A. Yes, sir.

Q. On the ebb tide?

A. Yes, sir.

Q. How often do you spring the hawser?

A. We have not done it very often. I could not tell how often.

Q. What proportion of time do you go around there that you do it?

A. We probably do it more on the first of the tide than on the last of it.

Q. How often do you do it as in comparison of the time you omit it on ebb tide?

A. We would not do it a half dozen times all season; don't keep track of it; always ready to do it if necessary.

Q. Has the springing of the hawser a tendency to bring the boats about more suddenly?

A. Yes, sir; twist them around quicker.

303 Q. In springing the hawser does it bring any more strain, in your opinion, upon the lines fastened to us?

A. Yes, sir.

The COURT: And the reason is that I suppose that the tow would be headed off towards the east shore?

A. Yes, sir.

The COURT: But springing the hawser would bring her more suddenly to the westward than if it was not sprung?

A. Yes, sir; it is a pretty short turn.

Judge MCCLELLAN: *Is* the position of the tow at the point 600 feet south of Boathouse point in the river depend in any degree upon the question whether the hawser was sprung or not?

A. No, sir; not below Boathouse point.

Cross-examination.

By Mr. ANDREWS:

Q. You never been employed on the Schuyler line?

A. Yes, sir; employed there now; Syracuse belongs to the Schuyler line.

Q. Assuming that the Niagara at ebb tide having a tow of 50 boats, and the Niagara being fast to the tow just passing West Point, do you think that the tow could have been saved from striking the east shore by the springing of the hawser?

A. I don't know how the tow struck the east shore.

Q. Suppose it struck, I ask you whether you think the springing of the hawser would have saved it in a calm night with proper skill.

A. I don't know whether it would or not; not in that case; no, sir.

Q. You mean to say that you have not skill enough to know that a tow can be got around West Point safely in calm weather by the aid of springing the hawser?

A. Yes, sir; they can be.

304 Redirect examination.

By Judge MCCLELLAN:

Q. When it can be got safely around West Point without springing the hawser?

A. Oftener than it will with it.

Q. Does the springing of the hawser increase or diminish the probability of the lines attaching the tow together breaking?

A. It will increase it.

Recross-examination.

By Mr. ANDREWS:

Q. You did not spring the hawser at all to avoid having your boats thrown on Boathouse point?

A. No, sir.

Q. You do not spring the hawser at all for the purpose of preventing your tow from striking Boathouse; you never do that?

A. Sometimes we do.

Redirect examination.

By JUDGE MCCLELLAN:

Q. Describe when you would do it.

A. When we think we are not going around in time.

Q. Describe the condition of the boat and tow that requires the springing of the hawser in passing around West Point.

The COURT: As I understand it, the gentleman's answer is when it becomes necessary from any cause to avoid Boathouse to spring the hawser.

A. Yes, sir.

Q. Describe the circumstance- and all of them, to your knowledge, and situation of the boat and tow that will require and does require springing of the hawser in passing that point.

A. Sometimes we can't get in the shape we want to, and the tide does not set just right; the tide carries you off further than you want to go, and then you put it on for safety.

Q. When those circumstances do not occur you do not put them out?

A. No, sir.

305 Q. Suppose the boat, the Niagara itself, in passing around West Point was within 150 or 100 feet of West Point headed the proper position there, would that indicate that the springing of the hawser was necessary or had been necessary?

A. It would not be necessary; not in that shape.

Recross-examination.

By Mr. ANDREWS:

Q. But suppose the fact was that, without knowing precisely where the steamboat was located in turning around West Point, the tow had struck Boathouse point, would not you infer that the springing of the hawser might have saved it?

A. No, sir.

The COURT: Why do you spring the hawser?

A. So as we can get ourselves straightened down.

The COURT: You spring the hawser when for any reason or cause

there is danger that without doing so the boats might strike the Boathouse point?

A. Yes, sir.

Redirect examination.

By Mr. FROTHINGHAM:

Q. You spring the hawser for the purpose of keeping the steamboat on her course?

A. Yes, sir.

Q. Where the steamboat keeps her course is there any necessity for springing the hawser?

A. No, sir.

Judge MCCLELLAN: If the steamboat does keep her course and the lines, nevertheless, break, the putting of the hawser is not the means of saving the boats from drifting?

A. No, sir.

Q. In no sense?

A. No, sir.

THOMAS A. BRIGGS' examination, suspended on page 414, resumed.

By Mr. ANDREWS:

Q. Assume this boat in the condition which I have described upon the rocks between Boathouse point and Garrison's—has stove
306 this sort of a hole—mashed her in so she leaks, making what I suppose you call a hole, what would be the proper course of the men in charge in respect to that hole? How about a canvas over her bow—how would that answer over the hole?

A. I know that would be good.

Q. And if then they were able to keep the water down by pumping you think there would be a prospect of the result being successful, so that she could go on with the tow?

A. Yes, sir.

Q. Suppose, instead of being the whole tow itself, it is a detached portion—a broken portion—and she is fixed to the residue of the tow to which she had broken; you know that was done; they were obliged to pull it and straighten her—take her up the river and then take her down; about that time the canvas came off—what then would be the proper course?

A. I should cut away the ceiling and try to stop it from the inside.

Q. You think the proper course to cut away and do what you could?

A. Certainly.

Q. Suppose at about that time that the water rushed in so that you could not stay there, what would you do?

A. I would not stay.

Q. You would not try to stop it up with your body?

A. No, sir.

Q. With a hole, with that barge loaded with 127,000 brick, what

sort of speed would the water make in coming in if the canvas got shoved off?

A. Owing how large the hole was.

Q. A hole six inches in diameter.

A. It would not take long to sink her.

Q. Be any possibility of batting that boat and stop that from the inside from such a rush that would come in?

A. No, sir.

Q. How long would it take to stop it?

A. I don't think they could stop a hole 6 inches in diameter. A very few minutes a man would drown if he stayed in there.

307 Q. You are acquainted with the practice of tow-boats in respect to the quantity of help that is required upon canal-boats and barges in going from New York to Albany or the reverse?

A. Some.

Q. What is the practice?

A. Some barges carries one; some carries four.

Q. What do you say about two—in respect to the question of average?

A. That is enough, to the best of my opinion.

Q. In respect to any requirement of tow-boat companies as to the captain—as to their having a captain on board of a barge.

Objected to by defendant's counsel—showing the requirements of a tow-boat company—improper.

Question waived.

Q. How is the fact as to whether or not it is necessary that a captain shall go with a barge that is taken in tow by steamer?

A. I was on one of the helpers 3 or 4 years there in New York; never think I was told to ask the question, and never did ask the question, take them in the tow.

Defendant's counsel object to what he was told.

Stricken out.

Q. What is the practice?

A. I never ask any questions.

Objected to.

Q. From your experience, then, whether or not it is the practice.

A. Not as far as I know.

Q. Whether from your experience it is or is not the practice.

A. It is not.

Q. What do you say as to the seamanship that is ordinarily found upon barges that are towed from New York?

A. I never was on a barge—employed on a barge.

Q. Have you any knowledge what is ordinary as found there—whether they have seamen or inexperienced navigators?

A. I think a very few of them are very experienced navigators.

DEFENDANT'S COUNSEL: Objected to.

A. I know it.

Q. In regard to the necessity of barges having small boats, what do you say as to them carrying small boats while in the tows?

A. Some of them have them.

308 Q. How is the fact as to the ordinary practice in that respect?

A. I never noticed enough to answer that question intelligently.

Q. You said you have been acquainted with the practice of tow-boat companies, but have not had enough experience in that respect?

A. I never noticed whether they had a boat or not.

Q. When the hawser is sprung in coming around West Point is there more or less strain on the port side of the canal-boats than when the hawser is not sprung, as a rule?

A. I should think there was less strain when springing, because they slack up a little. One line has to hold what 3 or 4 does.

Cross-examination.

By Judge McCLELLAN:

Q. What year were you commander of tow-boats on the river?

A. I think I was in one of the tow-boats a- helper — '68, '69, '70, '71, '72. I went in the Austin one year.

Q. Your experience are, then, those years?

A. From Albany to New York 4 years previous to that. I think I was in the S. O. Pierce.

Q. Is that all your experience?

A. Yes, sir.

Q. Those 4 years that you were in command of the S. O. Pierce, did you have any necessity of springing the hawser?

A. Yes, sir; we used to go to New York. In the spring of the year we got a big tow.

Q. You used to spring the hawser with the Pierce?

A. Not at great many times.

Q. How large a tow would she carry?

A. Small boat and carry 16 boats sometimes, oftentimes less.

Q. You thought it was necessary to spring the hawser with that boat occasionally?

A. If it was necessary.

Q. Do you recollect distinctly that you did it at all with her?

A. I cannot.

309 Q. Don't you think that the probability is that — that small boat and that amount of tow you did not spring the hawser?

A. I think the probability is that with 16 boats that is a pretty heavy tow for that boat.

Q. That comprise- your experience in that boat until you had the command of the boat Austin in 1871 and 1872?

A. Yes, sir.

Q. What was the capacity of that boat, the Austin?

A. We have taken to New York 4 boats, and taken 84. I think that is the largest tow we ever had.

Q. And where were the bits on that boat for the fastening of the hawsers?

A. After part of the boat.

Q. Upper or lower deck?

A. Lower deck.

Q. Good, easy boat to handle?

A. Well, I can't say that she was a very nice steering boat with a big tow.

Q. With her you found it sometimes necessary to spring the hawser?

A. Always going around West Point if we had over 40 boats, unless we had some barges up—that is, to help her; that is my recollection.

Q. What other experience?

A. Tow-boat around New York harbor.

Q. Spring the hawser there?

A. No, sir.

Q. Any other experience in boats that require springing the hawser—tow-boats?

A. No, sir.

Q. You found your judgment entirely upon the experience you had in springing the hawser upon this boat Pierce and Austin?

A. The Austin particularly; yes, sir.

Q. And the Pierce?

A. Yes, sir.

Q. I think you said on your direct examination that you could only speak from the practice upon your boat?

A. My experience on the boat I was on.

Q. And you only judge from that experience as to the propriety or not of springing the hawser on the Niagara?

A. I never was on the Niagara; I have seen them go around West Point.

Q. You only judge from your own experience from your own boats you commanded as to the propriety or impropriety of springing the hawser upon the Niagara?

A. I have seen other boats there.

Q. Have you had any experience?

A. No, sir; not in particular.

310 Q. You said you judged only your own experience?

A. Yes, sir.

Q. Do you know where the bits on the Niagara are?

A. Yes, sir; on the upper deck. I think she has a set on both decks.

Q. The bits upon the upper deck further forward than those on the lower deck?

A. I think they are very little.

Q. If this tow and the stern of the tow was travelling along south of Boathouse point, 600 feet south, and the ropes and the lines connecting the tow together should break there, do you judge that springing the hawser did or did not have any effect upon the breaking of those lines—springing the hawser around West Point?

A. I don't know as it did.

Q. Did the springing the hawser around West Point have anything to do with the lines breaking 600 feet below Boathouse point?

A. No, sir; I should think not.

Q. If this occurrence of breaking the line occurred as low down as 400 feet of Garrison's, would the springing of the hawser around West Point have any effect upon the breaking of the lines down there?

A. I don't know that it had.

The COURT: If the breaking of the lines occurred at a point 400 feet north of Garrison's, could either the springing of the hawser or the omission to spring the hawser have had anything to do with the breaking of the lines of that point which was 400 feet north of Garrison's, 100 feet west of the shore? In other words, if the breaking of the lines occurred at a point below Boathouse point, and after the tow had got around there, could the springing or not springing of the hawser in rounding the point have anything to do with the breaking of the lines at that place?

A. I don't know; it is owing to circumstances.

Q. Do you think it would have?

A. Not just at that time.

The COURT: If the hawser or the line had broken 8 or 10 miles below Boathouse point, you would not attribute the breaking
311 of the line at that point either to the springing or not springing of the hawser in passing West Point?

A. No, sir.

Q. In rounding West Point how far from the point would you regard the position of tow-boat unsafe or improper east of West Point?

A. I should regard her unsafe if she was east of the middle of the river, unless they went to New York and headed her to the westward and got her back again.

Q. And you regard any position then as safe if the steamboat in rounding West Point had been west of the middle of the river?

A. At that point; yes, sir; or in the middle of the river.

Q. And anywhere between West Point and the middle of the river you would have regarded the boat as in proper position?

A. Yes, sir.

The COURT: That is to say, that the proper position of the boat was the centre of the river.

A. Centre or the westward of the centre; right at West Point.

Q. When the steamboat was in proper position opposite West Point, as you have stated the place here, and at that time the lines attaching the tow had broke, in what sense could you charge the defendants of being responsible for the breaking?

Objected to and not answered.

The COURT: Assume that the steamboat was in its proper position where you have located it at West Point and the rope or tow-line broke, how could that be the fault of the steamboat; the lines at-

taching the tow had broken, how could that be attributed to the steamer?

A. I do not know. If it was my boat I would know. I was steering on behind. I would expect somebody would be responsible if I was on behind.

The COURT: What mismanagement of the steamer could you attribute the breaking of the lines provided the steamer when off West Point was in the centre of the river?

A. I do not know.

Recess for dinner.

312 FRIDAY AFTERNOON SESSION.

Q. You know of any rocks under water along the east side of that river above Garrison's point?

A. No, sir.

Q. Up until after you get by Boathouse point?

A. No, sir.

Q. You never have managed a barge, have you?

A. Not very much; some.

Q. Have you ever been on a barge when it had struck on a rock or against a rock and sprung aleak in consequence of it?

A. No, sir.

Q. Have any experience in stopping leaks in such vessels?

A. I had some experience; leaks in those sloops.

Q. You have seen the barge leak?

A. Yes, sir.

Q. That barge loaded with 254 tons of brick striking upon a rock, making a hole in it of the size described to you by the counsel that put the question in regard to this boat, describing it as the diameter of a stove-pipe, had been stove in that boat and no canvas had been put over it, how long, in your judgment, before it would have filled?

A. Clear hole, 6 inches in diameter?

Q. That is the manner counsel described it to you when that question just read to you in regard to the hole in the boat; did you see a motion made by either of the counsel in this shape (ind.)?

A. No, sir.

Q. Did you see it in either of the questions?

A. I did.

Q. With such a hole, 6 inches in diameter, stove in a boat loaded with that amount of brick on, how long would it take to fill it?

A. A very short time.

Q. Give me a time—minutes?

A. A very short time.

Q. In minutes?

A. I don't know as I could. I think it would fill in 20 minutes. That is a big hole.

Q. If that was a hole of this character, a hole where the plank was sprung in so as to make leakage through the slivers or what-

ever it was between timbers when they were pretty thick, twelve or fifteen inches apart?

A. That is pretty thick.

313 Q. How far apart would they be?

A. According how far forward they are.

Q. Within 10 or 15 feet of the bow?

A. Six inches.

Q. Assuming that the plank was stove in there between two of these timbers so that the boat leaked, it got on the rock, at first this leak was made and in 10 or 15 minutes they discovered that the water was getting high through visiting the water gauge——

A. Yes, sir.

Q. That they went and got some help and these two young men took a piece of canvas there that they say was big enough and had, by means of help, shoved under the boat in front with the ropes attached to each corner of the canvas and then those ropes tied upon the deck and on the boat; that that was done, the boat in the meantime off of the rock in the water, after taking that necessary time to do it, then upon pumping and by using one pump in that barge the water was pumped out and they went down and found it clear from water, broke through the ceiling that was on the bottom there of the boat, found and saw this, taking from three-fourths to a half hour to free from any water to make any impression; what then ought to have been done, if anything, for staying the leak of that boat in such a condition?

A. The only thing could have been done — try and stop it from the inside.

Q. While it was in that shape?

A. Yes, sir.

Q. And could it not have been stopped by placing some substance in between the sawed timbers and shoring it down strongly with timbers from the upper deck?

A. Under certain circumstances; yes.

Q. Under the circumstances I have described to you?

A. I want to know that a man cutting away the ceiling of the boat is apt to cut six inches from the hole.

Q. The hole is all entirely discovered; is it not practicable, and could not it have been very comfortably stopped so as to make a safe voyage to New York by shoring something on that and pressing it down under the circumstances I have related to you?

A. I think it could.

314 Q. And how long a job would it have taken two competent men to have done that?

A. Takes a very short time.

Q. Would it have taken a half hour?

A. No, sir.

Q. You spoke in regard to the boats, you say; is it less strain when the hawser is sprung because the boats have to slack up?

A. I say they generally do slack up.

Q. When you use that expression substantially that I have related, did you refer to the tow-boat or the boats in tow?

Objected to; not answered.

Q. I understood you to say that there was less strain when the hawser sprung, because the boats have to slack up. Did you use that expression?

A. I do not mean to say they had to slack up, but they generally do, from my experience.

Q. When they generally do, do you refer in that to the boats in tow or the boat towing?

A. I mean the steamboat.

The COURT: In springing the hawser the steamboat usually slacks up, according to your experience?

A. In putting the spring on the hawser you have to spring them pretty hard; one line is to take the whole spring; I should say two.

Q. Can you spring the hawser without slowing up?

A. Yes, sir.

Q. Then it would depend whether or no it was slowed up?

A. Had a good spring line you can.

Q. And it would depend whether there was less or more strain upon the tow upon the fact whether there was a good spring line there. You said it was unnecessary to slack up the boat to spring the hawser?

A. It can be done without slacking the hawser if the spring line is good.

Q. With a good spring line and with no slack of the boat in making the spring would there be any change in the strain upon the boat?

A. Not a great deal; no, sir.

315 Q. Does the tow-boat have charge of the hands and their working upon these boats in tow?

A. More or less.

Q. In what respect?

A. Tow gets out of shape. When the boat is out of shape, they generally holler they are out of shape.

Q. It would be very reasonable for men in the management of tow-boats to rely upon the statement of persons in charge of the boats in tow, would it not, as to the condition of their boats?

Objected to as unnecessary and immaterial.

The COURT: Whether it is reasonable or unreasonable, it is proper for him to show that it is usual for him to do so.

The COURT: Is it usual for the persons in charge of the steamer to rely upon the statements of the men upon the boats as to the condition of the boats?

A. I do not know what you mean.

The COURT: Suppose the captain of the steamer or the men in charge of the steamer wished to know the condition of a particular boat in the tow, and is it usual, under such circumstances, for him to rely upon the statements given to him by the men in charge of the condition of that particular boat?

A. I should think it would be.

Q. Somewhere in your testimony you give a reason for some of your conclusions, and use substantially the language that you should throw the responsibility or look to the responsibility of the tow-boat. To what did you refer?

Objected to by plaintiff's counsel.

The COURT: I understood the witness in that connection to say this was in answer to a question touching the propriety of cutting loose from the remainder of the tow, which had broken loose and cast anchor, and in that connection one reason which the witness gave why he would do so, that if he cut loose from the remainder of the tow and undertook to shift for himself he would discharge the steamer from responsibility. In that connection I understood the witness to use that expression.

316 Q. In regard to that—what did you mean by that?

A. What I said.

Q. Now repeat it, and tell me what you mean in regard to the drifting of the boat upon the rocks. You think that the drift would be harder with the boat free from the other boats of the tow?

A. No.

Q. Than it would alone?

A. No; I don't think it would make any difference.

Q. Would it have done any hurt for to have anchored 200 feet from the shore if the boat was alone?

A. Only hurt would have done you would have lost your anchor if you had not cut loose from the tow.

Q. If she was alone would it not hurt to anchor?

A. No, sir; she would swing against the rocks just the same before the anchor would fetch her up.

Q. Within that distance of the shore, this current coming down to it, would she be in any of the tide that would naturally be there of the water where the water was trying to go off?

A. No.

Q. How near would she be when she did probably go in such a place?

A. The tide has to strike the shore before it goes off to the westward.

Q. It had its effect on all the water?

A. I don't think——

Q. Do you think that all the water strikes the eastern shore?

A. No, sir.

Q. The water that strikes it stay there and has to get out of the way?

A. Don't set there long.

Q. All the time moving off?

A. Yes, sir.

Q. Don't that along the coast or shore—don't that make a current in which it moves?

A. Certainly.

Q. If this boat got in that current along by the side of that shore,

it would have further to travel than in a direct line, would it not?

A. I don't know what you are talking about.

Q. Water going against the bluff or upon the curve goes out of the water and goes to the place where it escapes, and the way towards that escape makes a current of water towards that escape. I believe so; don't you?

317 A. I tell you I don't understand you. The water sets over and strikes the shore.

The COURT: As the water sets off to the shore and strikes against the point and sets off in other direction the general drift would be in that direction?

A. Certainly, after it touched.

Q. You have no idea that all the water touches on the shore?

A. No.

Q. That sets off in a different direction and makes a current?

A. Goes with the current.

Q. And anything that comes in that current is affected by it?

A. Naturally.

Q. Now, the consequence would be that anything — was in that current would be deflected from the rocks?

A. Yes, sir.

Q. And consequently there would be a greater distance for the thing in the current before it would touch the rocks?

A. It is too heavy for me.

Q. You have taken quite a considerable interest in this case?

A. No, sir.

Q. Subpœnaed any witnesses for Mr. Magee or in his behalf, one of the mortgagees in this case, and found witnesses for him?

A. Yes, sir.

Q. You discovered Mr. Lynch for him?

A. I found out where he was.

Q. And subpœnaed him?

A. Yes, sir.

Plaintiff rests.

Defense resume.

LEVI L. DE NOYELLES recalled for defense.

Examined by Mr. FROTHINGHAM:

Q. Have you examined the chart in evidence for the purpose of determining the distance—relative distance—there?

A. Yes, sir.

Q. Tell us the distance from West Point directly across the river.

A. Nineteen hundred and eighty feet (reading from memorandum).

318 Q From Boathouse point to Garrison's?

A. Twenty-six hundred and forty feet.

Q. From Garrison's to the point below?

A. Twenty-one hundred feet.

Q. From Garrison's to the chemical works?

A. Four miles and a quarter.

Q. What is the distance from Magazine point to West Point?

A. About 3,000 feet.

Q. From the point directly opposite West Point to Boathouse point?

A. A little over 2,000 feet.

The COURT: After you had got across the river from West Point to a point directly opposite you would go in which direction 2,000 feet to strike Boathouse point?

A. A little east of south.

The COURT: When you speak of West Point what do you speak of?

A. Light-house.

The COURT: A point on the east shore directly opposite West Point light is 2,000 feet or about that north of Boathouse point?

A. Yes, sir; that is by figuring from the chart.

JOHN READ sworn for defense.

Examined by Judge MCCLELLAN:

Q. Were you the pilot of the steamer Niagara in October, 1876 at the time of the occurrence concerned here?

A. Yes, sir.

Q. You examined this map with Mr. De Noyelles in regard to the measurements on it?

A. Yes, sir.

Q. Accurate as he related?

A. Yes, sir.

Q. How long have you been a boatman?

A. I have been a boatman from 40 to 45 years.

Q. How long have you been pilot of a steamboat?

A. Altogether, tow-boat, 21 years a pilot.

Q. And how long have you been pilot on the steamer Niagara?

A. About 17 years.

Q. Still the pilot of that boat?

A. I expect to go there. She has not started yet.

Q. And you piloted that boat and tow on the night of this occurrence?

A. I did.

319 Q. You recollect passing West Point that night?

A. I do.

Q. Will you tell us how near in rounding that point your boat was on the point?

A. She was from 100 to 150 feet.

Q. Not over 150?

A. No, sir; I think not.

Q. And how was your tow behind there?

A. Right behind us; as near as she could be.

Q. You passed on from there?

A. Yes, sir; I passed on after getting clear of the point, so that I steered down to Garrison's.

Q. And the tow behind you in proper condition?

A. Yes, sir.

Q. You observed it?

A. Yes, sir; always look back at the tow and see how they come.

Q. You ascertained that by the lights?

A. By the lights; I had no other way. It was a dark night. You cannot always see your tow if they have no lights on it.

Q. How far did you thus pass before anything called your attention? To what point or near what point?

A. I got down just above Garrison's—the steamboat; looked back; I saw the tug-boat going up; she blew; I think the hawser tier must have been opposite the Boathouse point.

Q. At that time your tow, where was it? I mean the boats.

A. I say the tail end must have been in the neighborhood of Boathouse point; might have been a little above; the boat was near Garrison's; our steamboat was a little above Garrison's.

Q. And the tail of the tow must not have been far from Boathouse point?

A. Yes, sir; a little above Boathouse point.

Q. And how far, could you judge, from the lights?

A. Not a great ways.

Q. How many of those boats?

A. It might have been the length of two or three boats; it might not have been so far.

Q. At that time in what portion of the river was the tow and the back end of the tow?

320 A. As near in the middle of the river as I could get a boat; right in the middle of the river, as near as I could judge. When we heard the report of the signal of the break we looked back, and the tail end just began to change from the easterly; the head of it was right by the stern.

The COURT: What signal?

A. A little steamer that went up the east side of us.

Q. Tail of the tow sagged to the east?

A. It sagged a very little to the east as it came out behind the other tow.

Q. That was the first time your attention was called to it?

A. Yes, sir.

Q. Had there been previously any noise or calling from any portions of this hawser tow to the boat that you heard?

A. Not that I heard.

Q. Then from that time describe, as well as you can, what was done.

A. Then we stopped her right off; captain came to me and said, The hawser tier is broken in two; we got some hawser in so we can turn around. He came to me—he says, "We are all right; get her in shape to turn around to get her tow."

The COURT: When the captain first came to you, said the tier had broken in two, you stopped?

A. Yes, sir.

The COURT: To get the hawser in to make a turn?

A. Yes, sir.

Q. Shorten the hawsers?

A. Yes, sir; that is the way we take the hawsers in. After that he told me to get in shape to turn around, and then we turned around to the westward.

Q. Was this done as soon as *soon as* practicable?

A. As soon as could be done.

The COURT: Turn to the west?

A. Yes, sir.

Q. Then what?

A. Then we came back up to the boats and caught the boats at this point below Garrison's. The tow was right off that point below Garrison's.

Q. That was the point that was measured there?

A. Yes, sir.

Q. 2,100 feet below Garrison's?

A. Yes, sir.

321 Q. Tell what more took place, as far as you were concerned.

A. In the meantime the other pilot came on while we were turning, and when I got up to the boat the other pilot took hold, and I stayed on deck still.

Q. Tell what you saw and know.

A. After the captain got a hawser to the boats — sent the mate aboad the tow. We pulled them off to the westward—got them away from the rocks and made them up.

Q. What do you know about anything being out of the way, in regard to the tow, more than breaking apart at that time?

A. I heard somebody say——

Objected to.

Q. Any of the men on the boat?

Objected to.

Q. Mate or captain?

A. They talked, of course.

Objected to.

The COURT: I think that is a part of the *res gestæ*.

Q. What did occur there upon the boat in reference to this occurrence; what was said on the steamboat?

The COURT: I do not mean to say that all the conversation that took place on the steamboat was evidence.

A. I heard them ask the men aboard the canal-boats, "Anybody hurt?" They all said, "No." By and by the news came that the John T. Lee had a hole knocked in her—was leaking. That was while we were getting the tow that was broken loose together. I heard it at the time—I heard word came there that the John T. Lee had a hole knocked in her.

Q. Did you hear anything said about the accident?

A. Only what the mate told me after he came aboard; it was the mate's report to the captain.

The COURT: Is this what you just told us a part of, that while you were attaching the hawsers the word came to you?

A. They were hollering after the boat that the Lee had a hole; that she had hit a rock and was leaking. I heard that from off the boats.

The COURT: What report was made by the mate of the steamer to the captain. I am inclined to think that is not evidence.

322 DEFENDANT'S COUNSEL: We offer to prove that the mate reported that the boat had a canvas under her and was desirous of proceeding to New York.

The COURT: I don't think that is competent.

Objection withdrawn.

A. I understood the mate to say that he had asked him how he got along or how bad; whether he was doing anything; to which he said they were trying to find the leak inside. They had the canvas around the bow, thinking that it was al- right. They had stopped the leak; it was al- right—go on. That was all I heard; they was al- right; they could go ahead.

The COURT: That the mate reported that they had canvas about the bow?

A. Yes, sir; they were cutting away inside trying to get hold to stop it; they thought they were al- right to go on. That is all about I know.

Q. You know of anything about how the tow—what was done with the boat in tow after that?

A. It was made up and turned around and proceeded on down the river.

Q. Did you stay up?

A. I stayed up until they got headed down the river; appeared to be al- right. I saw nothing more out of the way.

Q. You turned in?

A. I turned in; everything was al- right; I turned in.

Q. What time was it that you made this discovery of the parting of the tow there when you was above Garrison's?

A. Quarter past twelve, as near as I can remember.

Q. Was it a calm night?

A. There was not much of wind; there was not a great deal of wind.

Q. How was the tide that night?

A. Ebb; I think about the last part of ebb. I won't be certain that is my mind about it.

Mr. FROTHINGHAM: What was the length of that tow—I mean from the stern of the steamer to the end of the tow—about the length of it?

A. From the stern of the steamer the hawsers must have been——

323 Mr. FROTHINGHAM: Give us altogether.

A. I got to figure it up; 11 lengths of canal-boats, and her hawsers were about——

Mr. FROTHINGHAM: Exact length of your hawser.

A. About 90 fathoms from the stern of the steamer to the first tier of boats. I don't know exactly; 540 feet.

Mr. FROTHINGHAM: Did your steamer at any time tow any of the boats on the rocks at that trip?

A. No, sir.

The COURT: What you mean by that answer is, I suppose, that while the boats were in the tow of the steamer and before the parting of the lines—that is what you mean?

Mr. FROTHINGHAM: Yes, sir.

The COURT: The question put to you is this, whether before the lines parted or the line parted, whether any part of your tow was hit against the rocks or the shore?

A. No, sir; 400 or 500 feet away from any part except West Point while the boats were fast to her.

Mr. FROTHINGHAM: In that transaction from the beginning what, if any, act was omitted to be done by the steamboat and its managers that could have been done better than it was?

A. There could none.

Mr. FROTHINGHAM: Would you do the same thing over again under similar circumstances?

The COURT: That is hardly proper. Your answer is covered by that.

Cross-examination.

By Mr. ANDREWS:

Q. Whether upon that steamboat that night the hawser was sprung.

A. I don't think it was, if I remember straight.

Q. You have some doubt about it, you mean to say?

A. I don't think there was, if I remember right.

Q. Is that as strong as you can state it?

A. That is strong enough.

324 Q. You can't state positive that your vessel—no part of the tow struck any rock?

A. I can. I looked out for that.

Q. You had a telephonic communication with boats behind?

A. Here is my telephone right here. I could see whether we were near the shore or not.

Q. How could you be sure about that?

A. Because I could see the lines.

Q. If you are not willing to swear positive that you did not spring the hawser——

A. I think we did not.

Q. That is as strong as you will make it?

A. That is as strong as I will make it.

Q. You was sworn before on a former trial of this case?

A. Yes, sir; twice.

Q. When you went back to take up the tow that had parted was it on the rocks then?

A. I was not over there to see whether——

Q. Were there any rocks for that part of the tow to be on?

A. They could lay against the rocks. I don't know whether they were or not.

Q. Were there any under that part of the tow?

A. I do not know.

Q. You swear positive that you did not draw the tow, no part of it, on the rocks. Can you tell whether there was any rocks under the water?

A. I do not know of any.

Q. Never did know of any?

A. Never knew of any under the water.

Q. Did you swear when you was sworn in this case on the first trial, "After he got his hawser off he sheered off to the westward to pull them off the rocks"?

A. I don't know whether I said "off the rocks" or whether "from the rocks."

Q. Did you swear to that?

A. I don't remember whether I said away from the rocks or off the rocks.

PLAINTIFF'S COUNSEL: I move to strike that out.

Q. Did you swear on the first trial of this cause at which you attended, After he got his hawser off he sheered off to the westward to pull off the rocks? I want yes or no.

A. I say I don't remember whether it was off or away from the rocks.

325 Q. You claim to have seen the first parting of the tow?

A. I did not see the first parting. I saw after the first signal she was parted.

Q. It was not until after the first signal was given that you noticed?

A. When the signal was given we noticed it. We could not tell whether she just parted.

Q. When you noticed that you was exactly where?

A. In the middle of the river.

Q. Whereabouts in respect to Garrison's?

A. Just above Garrison's, with the steamboat.

Q. And the tow where?

A. In the neighborhood of Boathouse point.

Q. Neighborhood?

A. Either the stern end or a little above of it or off of it.

Q. At that time when you first discovered?

A. Yes, sir; we were above Garrison's with the steamboat, I think.

Redirect examination.

By Mr. FROTHINGHAM:

Q. Do you recollect whether you said "off" or "from"?
A. I do not.
Q. What do you say now?
A. I say away from the rocks, because I don't know of any to be under the boat, so if there is none under it there can be none to pull her off of.
The COURT: You used the term "off;" pull them away from the rocks?
A. Off the rocks. I mean to pull them away from the rocks if I said off.
Q. About how long did that take your steamer to get about?
A. From a half hour to three-fourths to get everything fixed so we could get back again; can't tell exactly.

Recross-examination.

By Mr. ANDREWS:

Q. You are in the employ of the Schuyler?
A. Yes, sir.
326 The COURT: You are in the employ of Schuyler now?
A. I am hired.

Redirect examination.

By Mr. FROTHINGHAM:

Q. Was there any necessity at that night for springing the hawser?
A. No, sir; no occasion at all.
Q. You usually spring the hawser there ebb tide when you are carrying 50 boats?
A. Not very often.
Q. Where are the bits on the Niagara?
A. On the upper deck; what we call promenade deck.
Q. There *is* no difficulty whatever that night in going your usual course at West Point?
A. No; I could have fetched against west shore if you wanted to.
Q. When the hawsers are attached to the bits on the upper deck does that give you more power than below?
A. The bits are a little further forward on the upper deck; makes her steer quicker.
Q. Did you ever have any difficulty in going down past there with that number of boats on ebb tide?
A. No, sir; never did.
Q. For how many years?
A. I have been steering a boat for 21 years in a tow.

WILLIAM WALKER sworn for the defense.

Examined by Mr. FROTHINGHAM:

Q. Where do you reside?
A. Coxsackie.
Q. Business?
A. Boatman—steamboating; captain of the Anna.
Q. That is a tow-boat?
A. Yes, sir.
Q. What other boats have you been upon?
A. I came from the Connecticut there.
Q. What other boats?
A. New York, Baltic. I have been on the Niagara. I was on the Niagara about a month last season two different times.
Q. Have all these boats you spoke of been in the habit of towing on the Hudson river?
A. Yes, sir.
327 Q. Acquainted with the passage through around West Point and that vicinity?
A. Yes, sir.
Q. What is the practice in going there in reference to springing the line when you are going down the river on an ebb tide?
A. Always ready to spring if it is needed. If not we do not. I have been for years. It was never sprung with the Connecticut. I was in the Niagara some four weeks last summer. We did not spring her while I was in her; we are always ready to spring if it is needed.
Q. You heard where the boat Niagara was proceeding down the river, as described by the last witness, Mr. Reed?
A. Yes, sir.
Q. In your opinion, was there any necessity on that occasion of springing the hawser?
A. No, sir.
Q. In your opinion, does the springing of the hawser increase or diminish the strain upon the boats?
A. The shorter that turn the more strain there would be on the outside lines of these boats on the port side. The shorter that turn around West Point the more strain there would be on those lines.
Q. So that when the hawser is sprung there would probably be more strain on the lines?
A. Yes, sir; the shorter you turn this tow the more bend you have in it; the more strain on those outside lines.

Cross-examination.

By Mr. CADY:

Q. How long have you been boating?
A. I have been about thirty years.
Q. How long have you been in the employ of the Schuyler line?
A. Twenty-two years.
Q. Have you been pilot with them?

A. Yes, sir.
Q. And captain?
A. Yes, sir.
Q. And you are in their employ now?
A. I am.
Q. Is not the purpose of springing the hawser in going around West Point to bring your tow around there in such a shape that she won't strike on Boathouse point?
A. That is the idea, if it is needed.
328 Q. Don't you believe it was possible for the Niagara with a tow of 50 boats on a calm, clear night to have gone around West Point and kept her tow off the rocks on Boathouse point if the hawser had been sprung?
A. Yes, sir.

Redirect examination.

By Mr. FROTHINGHAM:

Q. Don't you believe on a clear, calm night like this that the Niagara would have properly and easily taken the tow of 50 boats around West Point that night without sending the boats on Boathouse point?
A. Yes, sir.
The COURT: Without springing the hawser?
A. Yes, sir.

Recross-examination.

By Mr. CADY:

Q. But you know the boats did go on Boathouse point?
A. I don't know that they did.
Q. Did not you hear?
A. No; I dont know they struck.
Q. If they did at Boathouse point it would look as though something was wrong?
A. They might have parted their lines.

Redirect examination.

By Judge MCCLELLAN:

Q. You know they did part their lines?
A. Yes, sir.

Recross-examination.

By Mr. CADY:

Q. You heard the tow went on Boathouse point that night?
A. I heard she struck somewhere.
Q. Have not you heard that they went on Boathouse point that night?
A. I can't say that I did.

329 JACOB CARR sworn for defense.

Examined by Mr. FROTHINGHAM:

Q. Where do you reside?
A. Germantown.
Q. Business?
A. Captain tow-boat.
Q. Of what boat?
A. Niagara.
Q. How long have you been captain of the Niagara?
A. Two seasons.
Q. What has been your business prior to that time?
A. Pilot.
Q. How long have you been engaged in navigating the Hudson?
A. I have been steamboating since 1864, and before that with sail vessels.
Q. How long have you been engaged in the towing business?
A. Since 1864.
Q. Been on what boat?
A. Upon the Baltic, New York, Niagara, America, Cayuga, Bordentown, Brant; part of one summer in the Armenia.
Q. What is the usual practice in reference to springing the hawser when proceeding down the Hudson past West Point with a tow of about 50 boats at ebb tide?
A. When they won't handle or control the tow, then you keep them in shape with your hawser sprung. I think the year before we only used the spring three times—less — half dozen times, all told.
Q. Very rarely necessary?
A. It is very rarely necessary.
Q. You heard the testimony of Captain Read relative to the position of the Niagara in going about West Point on this occasion?
A. Yes, sir.
Q. In your opinion, was she properly managed on that occasion?
A. I think she was properly managed.
Q. In your opinion, any necessity for springing the hawser?
A. No necessity for springing the hawser at all.
Q. In your opinion, is there a greater or less a strain upon the tow-boats when the hawser is sprung?
A. More strain on the port side of the tow in going around West Point when the hawser is sprung.
330 Q. In your opinion, could that tow be taken around West Point on that occasion safely with or without springing the hawser?
A. Yes, sir.
Q. No trouble whatever?
A. No, sir.
Q. Take her around properly?
A. Yes, sir.

Judge MCCLELLAN: On such a night as this and under such cir-

cumstances as related by Captain Read could there be any occasion or anything happen to that tow by a fault or neglect of the steamer?

A. I don't see as it could.

Judge McClellan: Is there any way that the steamer could have prevented the breaking or parting of the line attaching the tow together, to your knowledge?

A. No, sir.

Cross-examination.

By Mr. Andews:

Q. How long have you been in the employ of the Schuyler line?

A. I think I commenced in a small steamboat in 1863.

Q. Been in their employment ever since?

A. No, sir.

Q. How long in all have you been employed by them?

A. I could not tell. I was away two or three years—something like that—I do not know, but it was three seasons.

Q. You say you heard Captain Read's testimony?

A. Yes, sir.

Q. From that testimony, where did the detached portion of the tow first strike the east shore?

A. I could not tell you.

Q. You say you base your testimony for the defendant on the ground that you had heard Mr. Read's narration of this whole transaction. From that narration, where, in your judgment, did the tail end which broke off from that tow strike the east shore first?

A. After his testimony, it must strike below Boathouse point if it struck the shore.

Q. How far below?

A. It could not strike above Boathouse point.

331 Q. Where?

A. It must be between Garrison's and Boathouse.

Q. How far, should you judge, below Boathouse point?

A. Near midway.

Harvey Temple recalled for defense.

Examined by Mr. Frothingham:

Q. You heard the testimony of Captain Read?

A. Yes, sir.

Q. Under the circumstances narrated by him, in your opinion, was there any necessity for springing the hawser of the boat?

A. No, sir.

Q. How often is that done on an ebb tide?

A. For the last 11 years I have not seen not over half dozen times on my steamboat. Flood tides we generally spring.

Cross-examination.

By Mr. CADY:

Q. When you took your large tow around of 99 boats was that on what?
A. Ebb tide.
Q. Did you spring the hawser?
A. I did not.
Q. About how far ebb was it?
A. About high water; slack when we went around.

WILLIAM FOOTE recalled for defense.

By Mr. FROTHINGHAM:

Q. You heard the testimony of Mr. Reed?
A. Yes, sir.
Q. In your opinion, on that occasion was there any necessity for springing the hawser?
A. No, sir.

LEVI L. DE NOYELLES recalled for defense.

Examined by Judge MCCLELLAN:

Q. Did you hear the testimony of Mr. Read as to the management of that boat around West Point?
A. Yes, sir.
Q. In your opinion, was there any occasion for springing the hawser with a tow of that kind on that night, ebb tide?
A. No, sir.
Q. How frequent in passing West Point on an ebb tide is the springing of the hawser requisite?
A. Fair weather with no wind it is very seldom done.
Q. Depends upon the weather and wind?
A. Yes, sir.

EDWIN CUNNINGHAM recalled for defense.

Examined by Mr. FROTHINGHAM:

Q. Heard the testimony of Mr. Read?
A. Yes, sir.
Q. In your opinion, was the springing of the hawser of the Niagara on that occasion necessary?
A. Not the way I learn the way the position of the tow was in.

JOHN READ recalled for defense.

Examined by Mr. FROTHINGHAM:

Q. Was the hawser ready to spring on that night?
A. Yes, sir.
Q. Was it kept ready for springing?
A. Always kept ready for springing.

Testimony closed.
Recess until Saturday morning.

SATURDAY MORNING SESSION, 9.30.

Judge McClellan addresses the jury for defense.
Mr. Andrews for the plaintiff.

Judge WESTBROOK: I know not, gentlemen, how to better discharge my duties in charging you upon this occasion than to begin my charge as I began one to a previous jury at this term of the court by stating to you as I did to them that I know of no more important duty which men can be called upon to discharge in this life than that of jurors in the trial of a cause. You are to pass upon the rights of parties; you are to give to each equal and even-handed justice. If you refuse to give the plaintiff that to which he is entitled you are depriving him of his rights; if you
333 give to him something to which he is not entitled you are taking from the defendant wrongfully and giving it to the plaintiff. Not as honest men can you do either, and now as I am charging you I ask each one of you to look down into your own hearts and see if there is any other motive than that of attempting to do right and justice, swaying your conduct or influencing your action. Remember that if the human eye does not see the feelings which are swaying your breasts, an omniscient eye sees all, and you are naked and open and visible before his sight. I make these remarks not because I suspect that any man upon this jury will be swayed by any other than a proper motive, but because the magnitude of the interests and the difficulty of the questions cause me to caution you in approaching this case that you are to do so with the most conscientious feelings, with your judgments keenly awakened to the need of doing that which your oaths require. You have duties to discharge and the court has its duties: they do not clash. You are to decide the questions of fact in this case upon your own judgments and according to your own sense of right. The law you will take from the court and obey it in all your deliberations. In presenting this cause to you I shall not dwell upon questions of fact, but shall leave them to your unbiased judgments and only instruct you in regard to such principles of law as I deem applicable to the case. The cause is in brief this:

In October, 1876, upon Wednesday night (the day of the month was shown) the barge John T. Lee, about midnight, loaded with brick, was taken in tow by the steamer Niagara to be drawn to the city of New York. The tow of the steamer consisted of forty-nine boats, which were towed behind or at the stern of the steamer, in tiers of four or five boats each. The Lee was in the last tier of boats—that is, the tier of boats furthest to the stern of the steamer, and her position was that of the extreme left or east side of that tier of boats. The steamer with her barges proceeded without
334 accident until the next night, when about 12 o'clock at night (that is, about twenty-four hours from the time of starting) the Lee struck upon or against rocks, and by such striking there was a hole crushed or broken into her side. The two men in charge of the boat, with the assistance of the captain of the adjoining boat, drew a canvas under the bow and over the hole, tied it as securely

as they could by the four corners with a rope, then pumped out the water before cutting away the ceiling of the boat in the inside so as to get at the hole, which they stopped with a pillow—I think the witness said jammed it in as fast as he could with the foot—but not securing it by nailing a plank or board over it. While the boat was in this condition the steamer, which had become detached from the portion of the tow to which the Lee was attached, returned and took the detached boats, including the Lee, again in tow and proceeded on her voyage. In getting the boat in position in the tow (that is, backing her up for the purpose of turning around, or in the act of towing) the canvas became displaced, the boat, Lee, filled with water and sank with her cargo of one hundred and twenty thousand brick. The boat and cargo proved a total loss. The plaintiff, John Salisbury, who was the owner of the Lee (that is, the barge that was sunk), sues the defendant, The Schuyler Steam Tow-Boat Line, which was the owner of the towing steamer, the Niagara, for the value of the barge and its cargo of brick.

To recover the plaintiff must establish two propositions: First, that the towing steamer was guilty of some negligence which caused the accident; and, secondly, that the plaintiff or the men in charge (when I speak of the plaintiff I include the men in charge) were free from all negligence which contributed to the result. In speaking of negligence in cases of this kind you are always to bear in mind this proposition: It is the negligence which produces the result or which aids to produce the result that you are to regard as the negligence with which you are to deal. The towing steamer, for example, may have done something very wrong, but so long
335 as that act of the steamer did not cause the accident, for that negligence the plaintiff cannot recover. The men on the boat in tow may have done something very wrong; but unless the wrong act which they did was something which contributed to the accident, it is of no consequence, and therefore the negligence for which the defendant is liable must be that which causes the accident, and the negligence of the plaintiff, if he was guilty of negligence, to excuse the liability of the defendant must be such as contributes to the accident.

The first question, then, is this: Was the towing steamer guilty of negligence? Ordinarily that is a fact to be affirmatively shown by the parties seeking to recover. Sometimes, however, when certain facts exist and are proved the law infers *prima facie* negligence and calls upon the party against whom the inference is drawn to rebut and repel that inference of negligence; and probably if you shall find to be the facts in this case, as I understand them, that rule is applicable to the present case. From the evidence it seems to me to be clear, and whether or not it is clear is a question of fact for you to determine, and which you must determine, that the barge was either drawn against the rocks by the steamer or upon the rocks by the steamer or drifted upon them in consequence of one or more of the lines which hauled the boats in front of the Lee giving way, and the part of the tow to which she was attached being thus cast adrift, it floated towards and against the rocks, the Lee coming in

contact with them. It seems to me that one or the other of these theories is true from the evidence in the cause. I do not decide that as a question of law, but I leave it to you to decide as a question of fact, whether or not one of those two inferences must be drawn: First, whether the barge, being still in tow, was hauled and drawn against or upon the rocks, or, secondly, that, being cast adrift by the parting of a tow-line, she floated against the rocks or upon the rocks which produced the injury? Upon this condition of facts, if
336 you find either of these theories to be true, I charge you as matter of law that the defendant is called upon affirmatively to show that it was free from negligence. If the steamer towed the boat against the rocks, it is clear to my mind that she was *prima facie* negligent. This follows from the fact that the boat was helpless and could only act and move when she was attached to the tow and could only go when the steamer drew her. As the duty of the steamer was to keep the tow in the river, and as ordinarily there would be no difficulty in doing that, if therefore she hauled the tow against the rocks, she is called upon to explain the cause of so doing. Unless, therefore, there was some peril of navigation or some cause against which ordinary care could not provide which caused the boat to come in contact with the rock the steamer must be deemed negligent if you find as a fact that the boat was drawn upon or against the rocks. If, also, any of the lines which drew the plaintiff's barge or the other boats or barges to which the Lee was attached broke, then you are further charged, as such line or lines was or were a part of the machinery used in towing or hauling the Lee to New York, which the steamer had contracted to do, for the purposes of this trial such line or lines must be deemed that of the steamer, and the defendant is called upon to explain the occurrence and show that it was not in fault in that particular. The towing lines were a part of the machinery for towing, and though the lines which broke were owned in fact by the boats in advance, yet as the steamer used them for the purpose of hauling the tow and they broke, *prima facie* it was negligence upon the part of the steamer to permit them to break, and upon the defendant is thrown the burthen of showing that it was free from fault in that particular.

Now, do not misunderstand me. I do not mean to say that the steamer was the insurer of those lines; I do not mean to say that if the lines broke and parted that the steamer, under all circumstances, must be made liable; but while the steamboat was not the insurer of the lines it was bound to exercise due and proper
337 care in the selection of proper lines for that purpose, and if it fails in its duty in that particular and the line broke and an accident was thus caused, *prima facie* the steamboat is guilty of negligence. The contract in this case speaks of the defendant not being liable for the perils (I don't remember the precise expression)—whatever it is, it means this and only this—that the steamboat is not liable for such perils as result from causes beyond their control. It does not excuse them if the accident, if one occurs, was from negligence upon its part.

Therefore, you are charged if the boat was drawn against the

rocks, the defendant to exonerate itself from fault must show its steamer did its whole duty—not doing something it ought not to have done or omitting to do something it should have done If it either did something it ought not to have done or omitted to do something which it should have done, then it was negligent; or if a towing line broke it must show it broke through no fault of theirs, it having used due and proper, ordinary care in inspecting such line prior to its being used.

I don't think I am misunderstood. The presumption of negligence from the circumstances of this accident, if you find the facts to be as I have stated, raises the presumption of negligence, and it is for the defendant to excuse itself by showing that the accident happened notwithstanding the use of all due, proper, and ordinary care on its part.

The first question then is: Has the defendant shown itself free from fault? In answering this question of fact (it is left to you entirely as a question of fact) it is important for you to consider the question how it happened that this barge came in contact with the rocks? Was she drawn there? The argument of the plaintiff is that she was drawn there, because if the lines had parted below Boathouse point the boat would not have floated where she was found, which was six hundred feet below Boathouse point, and it is said that this was because before reaching Boathouse point an ebb tide sets towards the point, but when you reach the point and at
338 the point itself the flow or current of the tide is to the westerly, and therefore if the tow had been drawn beyond Boathouse point and then broke the drift and set of the tide would have sent her to the west shore and not to the east shore where the witness Ryan says she did strike. This is a question entirely for you. There is this difficulty with this theory, and to that I feel bound to call your attention. It is in conflict with the testimony of the eye witnesses who speak of the occurrence, all of whom, I believe, say (and whether all or not is a question of fact) that the ropes broke before the barge was upon or against the rocks. Having told you the theory of the plaintiff, founded upon the evidence of Capt. Lansingh, and having drawn your attention to the evidence of the eye witnesses, how the accident happened is left for you to decide—whether she was hauled there by the steamer or whether she drifted there—saying to you that you have a right to say that, owing to the darkness of the night and the confusion, the witnesses may be mistaken as to the time and place when and where the ropes parted. But you are further instructed while you may do this, before rejecting the positive evidence of witnesses who saw the occurrence or who claim they saw the occurrence, you should be able to see that the witnesses were plainly mistaken or willfully false, and the circumstances against the positive testimony should be very strong and conclusive to enable you to decide that the witnesses are mistaken or false. I do not say or intend to intimate by this that the evidence is not sufficiently strong to justify you in drawing the conclusion that the boat was hauled against or upon the rocks, but I do mean to say that, before you reach that conclusion, you should care-

fully consider the evidence of the witnesses who were eye witnesses of the transaction, and weigh it carefully with the other circumstances to which allusion has been made.

If you find the boat was drawn or pulled by the steamer upon or against the rocks, then I see no evidence upon the part of the
339 defendant excusing it. That, however, is also left as a question of fact for you to decide, and the court does not determine it as a question of law. It is proper to say, however, that according to my recollection of the testimony (and you are to say whether your recollection agrees with mine in that particular) the night was clear; there was no wind; the tow was not heavy, and all the witnesses say the taking the tow around the point was comparatively easy. If, therefore, under such circumstances the barge was drawn upon or against the rocks it is for you to say whether the defendant has shown that it was so drawn there, it being free from fault. If, however, you find that the Lee was not drawn upon or against the rocks, but that she drifted there after the tow-lines had parted, then it is for the defendant to show that such breaking of lines was without its fault.

If the line or lines broke and the cause was a rotten or defective line or lines, and due care on the part of the defendant would have prevented the use of such rotten or defective line or lines, then the defendant is chargeable with negligence; or if the line or lines, being sound, was or were subjected to a sudden and unnecessary strain from the mismanagement of the steamer, then the defendant is also *prima facie* chargeable with negligence. If, however, the defendant used due care in the selection of the towing lines, and the line or lines which parted was or were apparently sound and fit for the purposes for which they were used, and broke in consequence of a hidden or secret defect not discoverable by due and proper care, or if broken by a sudden strain not caused by any mismanagement on the part of the steamer, then the defendant was not negligent.

Now, gentlemen, I submit those single propositions to you. I do not mean to intimate one way or the other how you should find upon the questions of fact which they involve. I shall not go over the evidence, even to recall it to your recollection. You must bear it all in mind and bring to it your best recollections and your best judgment to determine it according to the right of the cause.
340 If the defendant was not negligent, then you need go no further. Your verdict must be in its favor. If, however, you find it was negligence, either because the Lee was drawn upon or against the rocks or because she drifted there owing to the parting of a line or lines which hauled the vessel and which was or were defective and which should have been discovered and not used by the defendant, or because of the mismanagement of the steamer, then the action is maintained so far as the right to maintain depends upon proving the negligence of the defendant, and your next question will be, Was the plaintiff free from contributory negligence?

Ordinarily when an accident happens you ought to be able to see that the plaintiff is free from contributory negligence; as if, for example, a man is killed in crossing a railroad track. To recover in

such a case the defendant must be shown to be negligent, and it also must affirmatively appear that the plaintiff was free from contributory neglect; but generally in such cases the question of negligence turns upon the conduct of the parties which preceded the accident. In a case of that kind you are not to measure the degree of fault. If the plaintiff was guilty under such circumstances, or he whom the plaintiff represents was guilty of any negligence, there can be no recovery. The negligence which contributes may be slight as compared with that of the person doing the injury; but if any negligence of the party injured contributes to the result the defendant is excused. This case, however, presents a question somewhat different. If the Lee was drawn against the rocks or the towline parted in consequence of the fault of the steamer, then the boat and those on board were put in peril by the act of the defendant, and you cannot expect from persons thus put in peril the same coolness of judgment and freedom from error as of a person not thus put in peril by the wrongful act of another. To prevent, under such circumstances, a recovery by the plaintiff where the defendant was negligent, the negligence which contributes to the injury on the part of the plaintiff must be gross
341 negligence, such as a person ordinarily under such circumstances would have been guilty of. Was the plaintiff guilty of such contributory negligence? It is said that he was in permitting the boat to drift against the rocks. In dealing with this question, of course, you will have to determine a prior question, whether she drifted there or was hauled there. If she was hauled there, then, of course, no act of the plaintiff could have prevented her motion against the rocks. If she did, however, drift there, could care which under the circumstances then existing ought to have been used have prevented it? The defendant says that an anchor should have been let go and the boat to have been cut loose from the other boats to which she was attached. The defendant's witnesses say that this ought to have been done. The plaintiff's witnesses say, on the other hand, it ought not to have been done; that she might still drift against the rocks before the anchor could have been thrown and the boats separated, or if the anchor was thrown she might have swung and struck the rocks; at all events, under such circumstances, it would not have been good judgment to have cast adrift and separated from the steamer and the tow. On the other hand, the defendant's witnesses say it could have been safely accomplished; it would be the natural impulse of a person to have done that act. That question you are to decide. I do not mean to say which is right or which is wrong. But remember you are not to pass on the conduct of the persons on board of that boat in the coolness of your own judgment, you at the time thinking that the men in charge were as cool as you now are while you are passing upon the question, but you are to say whether, amid the darkness of the night, the confusion on board of the tow, having been put in peril by the steamer, if you find as a question of fact that by the negligence of the steamer they were put in peril, they were called upon to do that which the defendant's witnesses say they should

have done. If they should, then, if the boat drifted against the rocks, the defendant must be excused. If, however, they were
342 not under those circumstances called upon thus to act, and in acting as they did (if you find they were placed in peril by the steamer) they were not guilty of gross negligence, then the drifting against the rocks, even though it could have been prevented by throwing overboard the anchor, will not excuse the defendant from liability. It is also said that the pillow, or whatever was used for the purpose of stopping up the hole, should have been shored up. Defendant's witnesses say this was easy to do. On the other hand, the plaintiff's witnesses say it was a difficult thing to do; that owing to the rush of water and the closeness of the boat's timbers it was hard to get the pillow so close up against the hole as to prevent the leak. This is also left to you. It is also claimed by the defendant that, knowing the condition of the boat with a hole in her only stopped by the canvas, it was negligence upon the part of those in charge of the boat to permit her without objection to be taken again in the tow to haul to New York. Undoubtedly it was an error of judgment, because the displacing of the canvas caused the boat to sink. You are to say whether, under the circumstances, that error of judgment was negligence on the part of those on board the boat. If it was, then the defendant must be excused. If, however, it was a mistake which could have been made by any person under those circumstances (that is, having been put in peril by the careless act of the steamer, if you have so found), and making it was not under such circumstances gross negligence, then the defendant is not to be excused from that cause.

Now, gentlemen, I do not know what else remains for me to submit to you or allude to in connection with the want of care on the part of the plaintiff. It is said that he should have been on board of the boat himself. Without determining that question one way or the other, it is proper to say that that question does not become important unless the persons on board of that boat were guilty of some gross negligence upon their part which contributed to
343 the result. I say gross negligence on their part after they were put in peril, if they were put in peril, by the steamer. I do not know that there is any act of negligence charged against them until after the boat was placed in peril. The questions, then, of negligence of the defendant, and the contributory negligence on the part of the plaintiff, under the rules of law I have given to you, are left to you as questions of fact to determine. If the plaintiff was guilty of negligence which contributed to the injury—that is, such negligence as I have explained to you—then your verdict must be for the defendant. If, however, he was not, and the defendant was guilty of negligence, then the remaining question is one of damages, which damages must be the value of the boat and its cargo, with interest from October, 1876, to the day of this trial.

Now, as to the value of the boat. The plaintiff's witnesses say she was worth $3,000; the defendant's witnesses say she was worth from twelve to fifteen hundred dollars. There was one hundred and twenty-seven thousand brick on board, worth in New York

$5.25 per thousand; at Schodack, where they were made, $4.50. The value of the brick and the value of the steamer are the amount of damages, with the interest added, to which the plaintiff is entitled if he is entitled to anything.

Now, gentlemen, the case is given to you to decide. I have already spoken of the importance of this case and the solemn responsibilities of your deciding it upon its merits. As you go to your rooms to deliberate remember, as I have said to you in the beginning, that, though the human eye does not see your motives or look into your hearts, an omniscient eye sees all; and if the verdict to which either of you agree or which you as a body may find is not the result of your honest judgments or conscientious convictions you yourself and yourselves will be judged by a tribunal which is infallible and whose knowledge is infinite.

Mr. McCLELLAN, for defence: I desire to except to some portions of the charge in regard to the rules of negligence. I under-
344 stand the court to charge that the rule as applicable in this case was so plain that negligence may be inferred.

The COURT: I do not think I charged that in that shape. Whatever I charged in that respect as shown by the stenographer's minutes you will be deemed as excepting to.

Mr. McCLELLAN: I except to that portion of the charge where the court speaks in reference to and leaves as a question (whatever it is) to the jury to say whether the boat was drawn upon the rocks or not was a question that was left to them. I except to that ruling and claim that there is no evidence whatever of having been drawn on the rocks; all the evidence is directly the reverse.

The COURT: I have said the positive evidence was the other way.

Mr. McCLELLAN: I except to that portion of the charge wherein your honor states that the defendant must show affirmatively that she is free from negligence.

Mr. McCLELLAN: I also except to the ruling of the court that the lines in fixing the tow are to be deemed lines of the steamer, and that it is called upon to explain them or anything in substance like that.

The COURT: I don't know that you designate the line properly. I meant to say that if the lines, a line, which hauled or drew the boats.

DEFENDANT'S COUNSEL: I except to the modification.

Mr. McCLELLAN: I except to that part of the charge wherein the court states that it was negligence in the steamer to permit the lines to break. Presumably they were called upon to explain it, and that the steamer was bound to use due and proper care in the selection of lines.

The COURT: Yes.

Mr. McCLELLAN: That the steamer was *prima facie* liable for the lines being in proper care.

Mr. McCLELLAN: I also except to that part of the charge of the court wherein it is stated that the facts in this case raise the presumption of negligence on the part of the defendant.

345 The COURT: I have not so told the jury. I told the jury this: That if they should find, as a matter of fact, that one of two things must have happened—either that the barge was hauled against the rocks by the steamer or that she drifted there because of the breaking of a tow line—if they found the accident was occasioned by either one of these two causes, then the defendant was called upon to explain away the presumption of negligence which would follow such a finding of facts.

Mr. MCCLELLAN: You also said something——

The COURT: If there be anything in my charge to the effect that the facts shown raise the presumption of negligence, I here and now desire to take back that part of the charge. I instruct the jury that the presumption of negligence only attaches if they find that this accident was caused in either one of the two ways I have mentioned.

Exception to modification.

Mr. MCCLELLAN: I also *accept* to that portion of the charge where your honor says substantially (I don't know exactly the reference to it) it is incumbent upon the defendant to show that the breaking of the lines was without defendant's fault.

The COURT: Yes, sir.

Mr. MCCLELLAN: I ask the court and claim it to be the rule in distinction to what the court said in actions for railroad damages in regard to the presence of mind—that is, if the party is put in peril. I ask that the same rule be applied in this case as in actions for personal damage, and that there is as much peril in such actions by railroad collisions as in this case.

The COURT: I think the same rule does apply in these cases, but I likened it to the case of a railroad accident where a party was injured and the defendant was clearly in fault, and after the party injured had been put in peril by the fault of the other it was claimed that the injured party had not done all which he should have done under the circumstances. The rule in a case of this kind, if
346 the boat was put in peril by the wrongful act of the defendant, should be that which is applicable to a person, one put in peril by the wrongful act of another. You cannot expect a person put in peril to act with the coolness of judgment that a person would act who was not put in peril by another. In this case I said if the jury found that the plaintiff or his men on his boat were put in peril by the wrongful act of the defendant, then under such circumstances they must not judge of the negligence of the plaintiff or the men on board by the same rule that they would judge them if not put in peril by the fault or the wrongful act of the defendant. There is no substantial difference between the case of a railroad accident and this except when in the former the alleged negligence precedes the peril and occurs in the coolness of the blood and when the injured party is not in peril.

Defendant excepts to the proposition as just charged.

Mr. MCCLELLAN: I understand the court to charge substantially

this was different from one of a railroad accident—any railroad accident; it was incumbent upon the plaintiff that his acts or none of his acts contributed.

The COURT: I think your mistake comes from this, that you did not bear in mind a single word that I used; that was—I said, "Ordinarily," where, when a railroad accident occurs, the alleged negligence precedes the condition of peril, and that in a case where the alleged negligence precedes the putting in peril, you do not measure the degree of care or negligence which either party used. If the plaintiff under such circumstances or the person whom he represents was guilty of any negligence contributing, though the person injuring may have been guilty of more negligence, then he, the defendant, is excused; but this case, if the jury find the boat of the plaintiff was put in peril by the act of the defendant (interrupted)——

Mr. MCCLELLAN: I understood your honor to draw the distinction, if you did, in this action from one from a railroad neg-
347 ligence, personal damage, and that in that I understand your honor to say that the plaintiff was bound to show himself not to contribute to it. I ask the court, if that is the case, to charge that the same rule must be shown in this action as in such an action; plaintiff's acts—he must show affirmatively that he did not contribute to the injury.

The COURT: I do so charge—that is to say, I charge the same rule governs both cases; but I say in the case of an accident upon a railroad, if the negligence which is claimed to excuse on the part of the plaintiff be the action of the party after he has been put in peril by the wrongful conduct of the person doing him the injury, then the law in such a case does not require of him the same degree of care that it would if he had not thus been put in peril. Only when the alleged carelessness upon the part of the person injured antedates the being put in peril did I mean to make my remarks applicable where it does antedate the putting in peril, then, as I told the jury, they will not measure the degree of care of either party. If the defendant is guilty of great negligence, and the person injured only of a little, the defendant is excused. But in a railroad case, where the party is put in peril by the wrongful conduct of the railroad company, and it is claimed after he was thus put in peril he was careless, then in that case the rule of law which I have deemed to be applicable to this case applies. The whole difficulty of the counsel is in misunderstanding my charge.

A person upon a railroad train as a passenger is put in peril by the railroad company being guilty of some act of negligence, and the company when sued for the injury claims as a defense that the plaintiff, notwithstanding the accident was caused by its negligence, could, if he had done certain things, have escaped without any injury. To a case of that kind I would apply the same rule that I have applied to this case. I would say that you must not judge of the conduct of the person injured by the ordinary rules which are sometimes applicable to cases of accident. He was imperilled
348 by the wrongful act of the defendant, and, being put in peril

he is human. Perhaps he has no coolness of judgment which he ought to have had under those circumstances; but as the railroad company had put him in peril it is not for the railroad company to say that the person injured did not act as a cool man ought to have acted. So, in this case, if the jury find whatever contributory negligence on the part of the plaintiff occurred after the boat and men on board had been put in peril by the wrongful act of the defendant, and they find they were thus put in peril, then the jury must apply to this case the rules applicable to an action against a railroad company in which a party injured had been put in peril by the wrongful or negligent act of the company.

Exception by defendant's counsel.

Mr. McCLELLAN: I except to that part of your honor's charge where reference is made about excuse in mistake of judgment, where your honor uses the word "gross" negligence. To that part I wish to except.

The COURT: I mean to charge that if a person was put in peril by the wrongful act of another, then after he has been put in peril by a wrongful act of another the negligence on his part which contributes must be gross. That is what I mean to say. To this defendant *accepts*.

Mr. McCLELLAN: Not liable anything short of gross negligence. That I *accept* to.

Mr. FROTHINGHAM, for the defence: I *accept* to that part of your honor's charge where you said it is not important whether the master was on board if the persons on board were not guilty of gross negligence.

The COURT: Perhaps I had better modify that very slightly by saying unless they can find that the master, if he had been on board the boat, would, under the circumstances, have done any better and have saved the boat.

Exception to modification and qualification.

Mr. FROTHINGHAM: I except to that portion of your honor's charge holding, if we are responsible at all, we are the value of the cargo.

349 The COURT: Yes.

Mr. FROTHINGHAM: In this connection I ask your honor to charge that the error of judgment upon the part of the plaintiff in not informing the defendant of his condition was, under the circumstances, negligence.

The COURT: That is one of the questions upon which I have had some doubt. I will send it to the jury as a question of fact.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I ask your honor to charge negligence of the defendant is not to be presumed from the accident.

The COURT: I won't charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I ask your honor to charge that the contract of towing was that the plaintiff's boat should be towed from New Baltimore to New York at the risk of the master and owners of the boat.

The COURT: I do charge that, and further charge in that connection that that risk which the plaintiff assumed does not include the perils of navigation against which good ordinary seamanship would have protected him, and that the plaintiff did not assume a risk resulting from the negligence of the defendant.

Exception to the qualification.

Mr. FROTHINGHAM: In that connection I ask your honor to charge that by the contract of towing the plaintiff assumes all the perils of navigation.

The COURT: Yes; all the perils of navigation, but not the perils of negligence.

Exception to the ruling.

Mr. FROTHINGHAM: I also ask your honor to charge that the contract of the defendant was to furnish a motive power and take the boat in tow and the propeller in the usual and customary way to New York, to furnish a steam-tug and suitable, proper — for the service, well and properly manned and fitted for the exercise of skill and care in the use of the motive power in the prosecution
350 and accomplishment of the voyage and the general conduct and management of the tow.

The COURT: I decline to charge that that is all that the contract of the steamer involves. I further charge that a proper discharge of the contract upon the defendant's part required of it ordinary care as to the lines which hauled or which were a part of the hauling power which propelled or drew the boat of the plaintiff.

Exception to the ruling and qualification.

Mr. FROTHINGHAM: I also ask your honor to charge that the defendant did not assume the possession or control of the plaintiff's boat.

The COURT: I do not know what you mean by that. I don't think he did. I think the plaintiff had a right to take the boat from the tow if he pleased.

Mr. FROTHINGHAM: I also request your honor to charge that it was the duty of the plaintiff to furnish the proper crew for his boat and see that she was properly manned, served, and equipped.

The COURT: That is so.

Mr. FROTHINGHAM: I also ask the court to charge that it was not sufficient that the plaintiff's boat be manned and equipped sufficient merely to keep a place in the tow, but she should have been manned and equipped sufficient for any peril of navigation that might arise.

The COURT: Yes, sir; for any perils of navigation.

Mr. FROTHINGHAM: I also ask the court to charge that the breaking apart of the tow and the temporary predicament of the towed

boat adrift in the river, when and where she would have to be cared for by navigators possessing sufficient skill to navigate a barge while not being towed, is a peril of navigation.

The COURT: If that means that the plaintiff must have his boat sufficiently manned and cared for if the boat should be put in a perilous position by the misconduct or negligence of the defendant it is refused. If it means, however, that his boat should be sufficiently manned to be cared for when put in peril by the ordinary perils of navigation, then I think it is sound.

351 Exception to the decision and qualification, and again I ask your honor to charge in the language requested.

The COURT: I refuse to charge in that language—in that form.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that the plaintiff's barge was not properly manned and served.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that the omission of the plaintiff's men to shore or fasten the pillow or some other suitable stopping material in the hole occasioning the leak was negligence and contributed to the damage, and the plaintiff cannot recover.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I ask your honor to charge that all testimony of the plaintiff's witnesses that his barge was sufficiently manned and properly served in an emergency predicated upon the fact or theory that the acts or omissions of a skilled navigator might thereby relieve the defendant from responsibility should be disregarded by the jury.

The COURT: I do not know that I understand that. I understand that proposition as involving so much of fact that I refuse to charge it as matter of law. I have explained quite fully what my views of it were; if that imports or imputes anything different from what I have charged I decline it.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I ask the court to charge that the plaintiff undertook in the proper care and management of his boat, and the use of proper skill and the exercise of every precaution and the doing of what was necessary to be done upon his boat, for the safety of the defendant.

The COURT: Yes; I think that is so. I charge that.

352 Mr. FROTHINGHAM: I also ask your honor to charge that in order that the plaintiff recover he must show that the defendant was guilty of negligence in the management of his steamboat.

The COURT: I hardly think that I can charge that as broadly as

that. I have endeavored to explain to the jury what my views of that subject were.

Exception by defendant's counsel.

The COURT: There may have been no mismanagement on the part of the steamer in the act of towing, and yet if an improper line, a defective line, was given to the steamer wherewith to tow, the defendant might be liable upon that ground, even though the steamer had not been mismanaged. I have explained in my charge to the jury when and under what circumstances mismanagement on the part of the steamer became important.

Exception to refusal and qualification.

Mr. FROTHINGHAM: I also ask your honor to charge that the evidence shows that the defendant did manage its steamboat with caution and skill and in the manner usually employed on such occasions.

The COURT: That is left as a question of fact for the jury and I decline to decide as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that the evidence of experts upon a theory or supposition, unless based upon the exact condition of things that actually existed at the time of the occurrence, cannot be considered by the jury as evidence against the positive testimony of reliable eye-witnesses as to the fact- as they really existed.

The COURT: I think that is sound. I have really stated that in substance to them.

Mr. FROTHINGHAM: I ask your honor to instruct the jury that they must not consider the evidence as to the cause of the breaking apart of this tow or the injury complained of, except as narrated by the eye-witnesses to the occurrence.

The COURT: I decline to charge that as matter of law.

353 Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that the slight deviation from the facts as they actually existed, such as the increased or diminished force of an ebb tide or of the wind or as to the exact spot to or towards which a boat might drift, makes a theory based upon such facts too uncertain to have any weight against testimony of reliable eye-witnesses in opposition to such theory.

The COURT: That involves partly a question of fact and partly a question of law; so far as I can bear in mind, I have explained to the jury what I think is necessary upon that subject. Of course a person who forms a theoretical opinion should found it upon facts which are proved in the case, and the jury must see that it is well supported by facts in the case before they give it any reliance whatever as against the positive evidence of witnesses.

Exception by defendant's counsel to refusal and qualification.

Mr. FROTHINGHAM: I ask your honor to charge that there is no evidence in the case of plaintiff's boat having been drawn upon the

rock by the steamer except such as might be inferred from the theoretical evidence, which I asked your honor to instruct the jury cannot be regarded in opposition to the evidence of the eye-witnesses.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that it was the duty of the plaintiff to remain upon his boat, and his absence was an act of negligence which might have contributed to the accident, and he cannot therefore recover.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I ask your honor to charge that the
354 evidence is undisputed that the plaintiff took from his barge at Athens the only small boat he had for her use. At the time of the accident she had no small boat, and the absence of such boat may have contributed to the accident, and therefore he cannot recover.

The COURT: I decline to charge that as matter of law, and leave it for the jury to say whether the absence of the small boat contributed to the accident or not.

Exception by defen lant's counsel to qualification.

Mr. FROTHINGHAM: I also ask your honor to instruct the jury that the absence of lights upon the plaintiff's boat was an act of negligence, and plaintiff cannot therefore recover.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that the plaintiff's boat displayed improper lights, and he was therefore guilty of negligence that might have contributed to the negligence.

The COURT: I leave that as a question of fact to the jury as to the former proposition.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that it was incumbent upon the plaintiff to show that the absence of proper lights and the displaying of improper lights did not contribute to the injury.

The COURT: I decline to charge that.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that the plaintiff has given no evidence showing that the absence of proper lights and the displaying of improper lights did not contribute to the injury.

The COURT: That asks me to charge upon the question of fact

upon the absence of evidence. I don't know of any evidence bearing upon that question given upon the part of the plaintiff.

Mr. FROTHINGHAM: Give us the benefit of the absence of it.

The COURT: Yes, sir.

355 Mr. FROTHINGHAM: I ask your honor to charge that it was also the duty of the plaintiff to have his boat so manned by skilled navigators in case an accident had happened by the act of the defendant that all prudent and customary efforts could be made to prevent the boat from sinking.

The COURT: I decline.

Exception by the defendant's counsel.

The COURT: If you mean, however, an unavoidable act of the defendant I will charge it. If you mean by the act of the defendant a negligent act, I refuse to charge it.

Exception to the qualification.

Mr. FROTHINGHAM: I also ask the court to charge that the evidence shows that the plaintiff's boat was left in charge of inexperienced navigators; therefore the plaintiff cannot recover.

The COURT: I decline to charge as a matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that — the time of the alleged injury there were chattel mortgages upon the vessel which were past due and unpaid, and that the mortgagees before the commencement of this action served notice upon the defendant that it must not pay any damages resulting from said accident to the plaintiff, but to them, the mortgagees, and therefore the plaintiff cannot recover.

The COURT: The facts are right, but the legal conclusion I decline to charge.

Exception by defendant's counsel to refusal.

Mr. FROTHINGHAM: I also ask your honor to charge that the accident in question was caused by the breaking loose of the plaintiff's boat with other boats from that portion of the tow which was fastened with the lines of the boat towed, and therefore the plaintiff cannot recover, those lines not having been furnished by the defendant.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

356 Mr. FROTHINGHAM: I ask the court to charge that the plaintiff had been in the habit of towing with the defendant for a number of years and was presumed to know the custom of boats being towed to furnish their own lines to attach themselves to other boats in the tow.

The COURT: Yes; I think that is so.

Mr. FROTHINGHAM: I ask the court also to charge that the accidental breaking of a line in the tow, not furnished by the defendant, but furnished by the boats being towed according to the custom known to the plaintiff, is a peril of navigation that the plaintiff as-

sumed, and he cannot recover by such breaking if the line was sound and sufficient at the place where the tow was made up.

The COURT: That I will charge.

Mr. FROTHINGHAM: In this connection I ask your honor to charge that the evidence is undisputed that the line was sound and sufficient at the place where the tow was made up.

The COURT: If by that you mean that the only evidence of a person who saw the line at the time the boats were put in tow tends to that effect, it is true, and I so charge. If by that you mean to say there is no other evidence in the case from which the jury might draw the inference it was not sound, then I decline. There is some evidence of Nelson of the boat breaking loose in consequence of a defective line.

Defendant excepts.

Mr. FROTHINGHAM: In that connection I ask your honor to charge that a line found in the tow after it has been engaged in towing for upwards of 24 hours cannot be presumed from its appearance to have been unsound and insufficient at the place where the tow was made up.

The COURT: That, as questions of law, I do not propose to pass upon. I leave them all as questions of facts to the jury.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that the
357 owner of each boat in the tow assumed the proper care and management of his boat; that he furnished sufficient lines for such purpose was part of such care and management, and the violation of his duty by any one of such owners cannot make the defendant liable, especially where it is not shown that he knew of such violation.

The COURT: I decline to charge that as matter of law. There may be some things which the owner of a canal-boat might do in the progress of the tow for which the steamer would not be liable. I do not mean to say or tell the jury that if the owner of a canal-boat should do some act which was willfully wrong or grossly careless, in consequence of which the plaintiff's boat got injured, that the defendant would be responsible for it. I charged the jury that the rope which hauls the plaintiff's boat or which hauls the mass of boats to which he is attached is a part of the motive power, in regard to which the defendant is bound to exercise due and ordinary care.

Exception to the qualification by defence.

Mr. FROTHINGHAM: I ask your honor to charge the proposition of law.

The COURT: I decline.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that the plaintiff entered into an agreement to arbitrate the question of damages

growing out of the alleged accident, which agreement was still in force at the time of the commencement of this suit, and therefore the plaintiff cannot recover.

The COURT: I decline to charge that.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I ask the court also to charge that the plaintiff's boat was loaded with 127,000 brick, weighing upwards of 254 tons; that plaintiff's evidence shows that 230 tons was an overloading, and plaintiff cannot therefore recover.

The COURT: That evidence makes a question of fact for the jury. I do not charge as matter of law that the boat was overloaded,
358 but I do charge that if the boat was in fact overloaded and the jury find that the overloading of the boat contributed to the accident that then the plaintiff cannot recover.

Exception to qualification by defense.

Mr. FROTHINGHAM: I ask your honor to charge that if they find the boat was overloaded it was incumbent upon the plaintiff to show that it did not contribute to the accident.

The COURT: Yes; I think that is so. If the boat was in fact overloaded and had a bigger load on than she could carry with safety, then I think that the burden is shifted, and the plaintiff is called upon to show that that did not contribute to the accident. The jury will also bear in mind the other evidence, that the boat had frequently carried before that a cargo as great as that, and on one occasion a larger cargo with safety. There is other evidence in the case to show 127,000 was about her ordinary load. I have said this was the evidence. That is left to the jury. My recollection of the evidence may be at fault.

Mr. FROTHINGHAM: In view of the qualification your honor has made, I ask your honor to charge there is no evidence showing that the boat was not overloaded, and that the overloading of the boat did not contribute to the accident.

The COURT: I refuse to charge that the undisputed evidence is that the boat was overloaded.

Defendant excepts.

Mr. FROTHINGHAM: I call your honor's attention to the other part of my request. There is no evidence offered by the plaintiff to show that it did not contribute to the injury.

The COURT: If the jury is satisfied that the boat was overloaded that is the end of the case so far as recovery by the plaintiff is concerned.

Mr. FROTHINGHAM: I also ask the court to charge that the evidence of plaintiff that 8 years before the injury he had car-
359 ried 134,000 brick is not sufficient evidence to overcome his other testimony that at the time of his injury 230 tons was an overload without plaintiff showing that his barge was then as capable, the presumption being that the older the barge was the less she could carry.

The COURT: I refuse to charge as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that it was negligence upon the part of the plaintiff in not having a watch on the deck of his boat at and immediately before the alleged accident, and therefore he cannot recover.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that the omission to have a watch on deck raises a presumption of negligence; at all events it makes it incumbent upon the plaintiff to show that it did not contribute to the injury.

The COURT: I decline.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that if the defendant's witness Reed was correct in his conclusion of the Niagara within 150 feet of West Point and the tow was not broken in two, it was a physical impossibility for the tail of the tow to strike the eastern shore, the tow having been about 1,700 feet long and the river 1,980 feet wide.

The COURT: I must leave that to the jury.

Exception by defendant's counsel to the court refusing to charge as matter of law.

Mr. FROTHINGHAM: I also ask the court to charge that, the plaintiff's men knowing the condition of their boat, it was their duty to have so informed the mate, and their negligence so to do will prevent the plaintiff's recovery.

The COURT: I decline to charge that as matter of law and I will leave it to the jury to say whether or not he did not inform them.

Exception by defendant's counsel.

360 Mr. FROTHINGHAM: I ask the court also to charge that it was the duty of the plaintiff to use the anchor on board, and the omission to use it was an act of negligence which will prevent the plaintiff's recovery.

The COURT: I decline.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that it was an act of negligence on the part of the plaintiff to have charge on board of his boat men who had never used an anchor, and he cannot recover until he shows that it did not produce the injury.

The COURT: I decline.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that after the alleged injury the plaintiff elected to go to New York, and he know-

ing the condition of his boat assumed all perils, and he cannot therefore recover.

The COURT: I decline to charge that as matter of law.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge that a master must not abandon his vessel so long as it is practical for human exertion, skill, and prudence to save her. After the breaking of the tow it was obligatory upon the plaintiff to have had on board an experienced master, whose duty it was to take all possible care of the vessel and cargo; that even reasonable care and diligence was not sufficient, but it was his duty to have on board an experienced navigator, who was capable of exercising judgment upon the spur of the moment as to the use of all possible means to save the vessel.

The COURT: I decline to charge it.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask your honor to charge—it having been affirmatively proven that the time of the accident the master was absent; his boat was in charge of inexperienced navigators; that he had omitted to display proper lights, had displayed improper lights; that his boat was overloaded; that his boat was
361 heavily loaded; that no watch was on deck at the time of the breaking of the tow—it was incumbent upon the plaintiff to prove that none of these circumstances contributed to the accident.

The COURT: I decline to charge that as matter of law; it involves a great many questions of fact.

Exception by defendant's counsel.

Mr. FROTHINGHAM: I also ask the court to charge that if the jury should find that at the time of the accident either that the master was absent; that his boat was in charge of incompetent navigators; that he had omitted to display proper lights; had displayed improper lights; that his boat was overloaded, with no watch on deck, at the time of the breaking of the tow, and the plaintiff had not affirmatively shown that the act so found did not contribute to the injury complained of, the plaintiff cannot recover.

The COURT: Yes; if they find all those facts in your favor or either of them.

Mr. FROTHINGHAM: I ask the court also to hold and charge — the jury have any doubt as to the effect of either of the acts or omissions stated in the last proposition the defendant is entitled to the benefit of the doubt and the verdict must be rendered for the defendant.

The COURT: Not to that extent. The rule that a case must be proved beyond a reasonable doubt applies only in a criminal case. This is not a criminal case.

Exception by defendant's counsel.

Defendant's counsel also excepts to that part of the charge to the effect that if the steamer hauled the tow against the rocks, unless there was some peril of navigation or some cause against which

ordinary care could not provide, which caused the boat to come in contact with the rocks, the steamer must be deemed negligent; and defendant asks the court to charge that, plaintiff having assumed the perils of navigation, it was incumbent upon him to show that any such collision was not caused by a peril of navigation
362 or other cause which ordinary care could provide against; which the court declined to do, and the defendant excepted.

Defendant's counsel also excepts to that part of the charge to the effect that if, under the circumstances detailed, the persons on plaintiff's boat were called upon to act, and in acting as they did they were not guilty of gross negligence, then the drifting against the rocks, even though it could have been prevented by throwing overboard the anchor, will not excuse the defendant from liability.

The COURT: The rule of law to which this exception is taken is only charged as applicable if the jury find the boat was imperiled by the negligence of the steamer. In other words, if the canal-boat was imperiled by the carelessness of the steamer, the men on board were not cool, it would require gross contributory negligence to excuse the steamer.

The jury retired at 2.30 p. m. Saturday, April 28, 1884, and returned at 4.30 p. m. with a verdict for plaintiff.

The defendant's counsel then duly made a motion to said court to set aside the verdict in this action upon the minutes of the court on the ground that said verdict was contrary to the evidence; that it was contrary to law, and that valid exceptions were taken by defendant to various rulings of the court; and the court, after hav- duly considered, thereupon made an order as follows:

At a circuit of the supreme court, held for the State of New York, at the court-house, in the city of Hudson, on the 28th day of April, 1884.

Present: Hon. T. R. Westbrook, justice.

JOHN SALISBURY
against
SCHUYLER'S STEAM TOW-BOAT LINE.

A motion having been made to set aside the verdict in this
363 action on the minutes of the court, and after hearing Messrs. McClellan and Frothingham, of counsel for the defendant, in favor and Messrs. Cady and Andrews, of counsel for the plaintiff, in opposition to said motion—

Ordered that said motion be, and the same hereby is, denied.

To which decision of the court the defendant then and there duly excepted.

Supreme Court, Columbia County.

JOHN SALISBURY
against
SCHUYLER'S STEAM TOW-BOAT LINE.

The foregoing is the case herein as settled, it being understood and ordered that the same contains the evidence "*in hæc verba*" or by question and answer, and that it be filed with the clerk of Columbia county.

T. R. WESTBROOK.

A copy.
WM. S. HALLENBECK, *Clerk.*

Supreme Court, Columbia County.

JOHN SALISBURY
against
SCHUYLER'S STEAM TOW-BOAT LINE.

Please take notice that the defendant in this action appeals to the general term of the supreme court from the judgment entered herein in the office of the clerk of Columbia county on the
364 11th day of October, 1884, for $6,360.37, damages and costs, and from the whole of said judgment, and from the order denying a new trial herein, made on the 28th day of April, 1884, and entered in the office of Columbia county, and from the whole of said order.

Dated Albany, January 31, 1885.

Yours, etc.,
W. FROTHINGHAM,
Attorney for Defendant and Appellant.

To Cady & Hoysradt, Esqs., plaintiff's attorneys, and to the clerk of Columbia county.

STATE OF NEW YORK, *County of Columbia,* } *ss:*

I, clerk of the county of Columbia and of the courts of record thereof, do hereby certify that I have compared the annexed copies of judgment-roll, case and exceptions, order for filing same, order denying motion for a new trial, and notice of appeal with the original thereof on file in this office, and that the same are correct transcripts therefrom and of the whole of said originals.

In testimony whereof I have hereunto set my hand and affixed my official seal this 2nd day of February, 1885.

[L. S.] WM. S. HALLENBECK, *Clerk.*

Statement under Rule 41.

Suit commenced April 18, 1877.
Complaint served April 18, 1877.
Answer " May 26, 1877.
Original parties same as in present title.

365 ALBANY COUNTY, *ss:*

Worthington Frothingham, being duly sworn, says he was defendant's counsel upon the motion for a new trial herein, and that Justice Westbrook delivered no written opinion upon the decision of said motion.

W. FROTHINGHAM.

Sworn before me February 3, 1885.

WALTER D. FROTHINGHAM,
Commissioner of Deeds.

At a general term of the supreme court held in and for the third judicial department, at Saratoga Springs, Saratoga county, on the 21st day of September, A. D. 1885.

Present: Hon. William L. Learned, presiding justice; August Bockes, J.; Judson S. Landon, J.

JOHN SALISBURY, Respondent,
against
SCHUYLER STEAM TOW-BOAT LINE, Appellant.

The appeal from the judgment entered in the clerk's office of Columbia county in this action on the 11th day of October, 1884, for $6,360.37, damages and costs, and from the order denying a new trial, made and entered in this action on the 24th day of April, 1884, having been heard at the general term, now, on motion of Cady & Hoysradt, for respondent, after hearing Worthington Frothingham, Esq., for appellant, it is adjudged and—

Ordered that the said judgment and order be, and they hereby are, affirmed, and that the appellant pay to the respondent the costs and disbursements of said appeal.

Entered Oct. 8, 1885.

(A copy.)

SETH WHALEN, *Clerk.*

366 JOHN SALISBURY, Respondent,
against
SCHUYLER STEAM TOW-BOAT LINE, Appellant.

The appeal of the defendant from the judgment in this action, in favor of the plaintiff against the defendant, entered in the Columbia county clerk's office on the 11th day of October, 1884, for $6,360.37, damages and costs, and from the order denying the defendant's motion for a new trial herein having been brought on for argument at a general term of this court, and the said judgment and order having been affirmed with costs, and the respondent's costs having been taxed at seventy-nine dollars ($79.00), it is now, on motion of Cady & Hoysradt, attorneys for the respondent—

Ordered and adjudged that the said judgment and order appealed from be, and the same hereby are, affirmed, and that the respondent, John Salisbury, recover of the appellant, The Schuyler Steam Tow-Boat Line, seventy-nine dollars ($79.00), and have execution therefor.

WM. S. HALLENBECK, *Clerk.*

STATE OF NEW YORK, } ss.:
Columbia County, Clerk's Office, }

I, William S. Hallenbeck, clerk of the county of Columbia, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the foregoing copy judgment-roll (John Salsbury *v.* Schuyler Steam Tow-Boat Line) with the original thereof remaining on file in this office, and that the same is a true and correct transcript of such original roll and of the whole thereof.

In testimony whereof I have hereunto set my hand and [L. S.] affixed the seal of the said court and county this 5th day of November, 1885.

WM. S. HALLENBECK, *Clerk.*

367 (Foregoing endorsed:) Supreme court. John Salisbury respondent, against Schuyler Steam Tow-Boat Line, appellant. Judgment of affirmance. Cady & Hoysradt, Hudson, N. Y. Copy judgment-roll. Columbia Co., clerk's office. Filed Oct. 21, 1885, 10.45 a. m. Hudson, N. Y.

367½ JOHN SALISBURY, Respondent,
against
SCHUYLER STEAM TOW-BOAT LINE, Appellant.

LANDON, *J.*:

The main questions in this case were the ordinary ones in an action of negligence: Was the plaintiff injured by the negligence of the defendant, and was he free from contributory negligence? The case was important, the trial long, the evidence conflicting; many exceptions were taken; but unless some error was committed material to the two leading questions we must affirm the judgment, because the jury have resolved by their verdict the conflicting tendencies of the evidence.

The defendant asks us to find that there was no negligence upon his part. Stated most favorably for the defendant, the facts are these: The defendant's steamer Niagara was, on the night of October 9, 1876, towing down the Hudson river forty-nine boats, of which the defendant's barge, the John T. Lee, was the rear boat on the port or east side of the tow. In rounding a curve in the river near West Point, about midnight, the tow broke somewhere near the middle, and the rear boats, including the defendant's barge, were separated from the tow, and while in that condition and before they could be re-attached the plaintiff's barge drifted by force of the current or its momentum or both against the rocks on the east side of the river and had its bottom so broken that it afterwards sank and was, with its cargo of brick, lost. It was not the fault of the plaintiff that the tow parted. His lines did not break; the lines in advance of his barge broke. The court, in substance, left it to the jury to determine whether the defendant had used reasonable care in inspecting and in subsequently using the lines which broke. That was the proper test to be applied.

368 It is not to be expected a proper line will break under the strain of an average tow on a calm night with no disturbing causes any more than that a railway train will leave the track, or a good bridge break down, or a house fall.

The conditions existing *prima facie* exclude other conclusions than that the rope was defective, and if it was defective the defendant who used it ought to explain.

Seybolt *v.* N. Y., L. E. & W. R. R. Co., 95 N. Y., 562.

The contract between the parties was that the defendant would tow the plaintiff's barge "at the risk of the masters and owners." This did not exempt defendant from liability for its own negligence. Woodin *v.* Austin, 51 Barb., 9; aff'd 4 Alb. L. J., 113. If the breaking of the rope was referable to the negligence of the defendant that risk was not by the contract cast upon the plaintiff. There was some evidence tending to show a probable absence of reasonable care on the part of the defendant in inspecting the ropes which broke. The requirement of reasonable care does not make the defendant an insurer. It does not seem to be a rigid exaction to ask that he should exercise it, and, in case of an injury that *prima facie* accuses him of omitting it, it seems reasonable that he should show to the satisfaction of the jury that he did not.

The court also instructed the jury that if the boat was drawn upon the rocks by the defendant the presumption of negligence would attach. The defendant does not urge that this was an erroneous statement of the law, but urges that the evidence did not admit of any such hypothesis, but repelled it. The court stated that the positive evidence repelled it or was the other way, but a witness, Lansing, an expert in river navigation, was permitted to testify, under objection and exception by the defendant, to the effect that upon a certain hypothetical state of facts the plaintiff's barge, in his opinion, was towed in upon the rocks. The objection to this evidence was that it was the admission of opinion to contradict positively established facts. The witnesses who were on the

369 plaintiffs' barge testified in substance that the barge struck the rocks after the tow parted, but the circumstances which they detailed would seem to admit of the conclusion that they received that impression without knowing the fact to be so. The night was dark, and they had sustained the collision and were working to avert its consequences before they became aware that the tow had parted. It does not conclusively appear that the opinion of the expert contradicted the established facts and was therefore obnoxious to the objection that it tended to substitute an opinion in place of the truth. If the positive testimony satisfactorily established the fact that the tow parted before the collision, it would be improper to receive the testimony of expert witnesses that, in their opinion, the fact was otherwise. Of course it would be competent to adduce facts the tendency of which would be to show the improbability of the barge drifting upon the rocks, and it might well be in a case of this kind that the tendency of those facts would be obvious to an

expert navigator and not at all so to the uninstructed court and jury.

It is manifest that the testimony of the witnesses upon the question whether the tow parted before or after the barge struck the rocks was not entirely conclusive in the mind of the court, and in that aspect of the case it was competent to receive the testimony of an expert familiar with the locality and with the action of the tides and currents in the stream at that place and their natural and usual effect under circumstances shown to exist; and, of course, his opinion, whether the actual result was referable to the action of the towing steamer or to the parting of the tow, would be one which long experience would enable him much more intelligently to form than could a juror whose nautical education was solely acquired during this trial. Whether the facts already proven are so conclusive as to show that the question is already resolved must, when expert opinion is offered to the same question, be decided by the trial judge, and his decision will be entitled to that respect which is
370 usually accorded to an intelligent court having the opportunity to see and hear the witness.

It is quite clear that in the absence of positive proof from witnesses entitled to respect the opinion of an expert with regard to the different results which would follow from different situations might well be the best evidence the nature of the case could afford. We therefore think it was not error to receive the testimony of the witness Lansing.

The plaintiff urged many facts from which he argued that the fact must have been that his barge struck the rocks before the tow parted, and that it parted because of the striking upon the rocks, and the court submitted this theory to the jury. It cannot be said that the court could have fairly withheld it from the jury. It was submitted to them substantially with the weight of the court's opinion against its probability, which certainly was as favorable for the defendant as it could well claim.

The defendant claimed that the plaintiff's negligence contributed to the injury. The grounds upon which this contention rested are well summarised in the following request of defendant's counsel to charge: "That if the jury should find that at the time of the accident either that the master of plaintiffs' barge was absent, that it was in charge of incompetent navigators, that he had omitted to display proper lights—had displayed improper lights—that his boat was overloaded, with no watch on deck at the time of the breaking of the tow, and the plaintiff had not affirmatively shown that the act so found did not contribute to the injury complained of, the plaintiff cannot recover."

The COURT: "Yes; if they find all those facts or either of them."

In other parts of the charge the court in substance said that if the plaintiff was found to be negligent in any of the respects claimed it must also be found that the negligence contributed to the injury in order to defeat a recovery.

371 We think the last proper instruction. It is easy to see in a case of a collision between two boats in the darkness that

the absence of proper lights or the display of improper lights tends to invite the collision, because the absence of proper lights or the display of false lights misleads the approaching vessel, and the burden ought to rest upon the misleading party to excuse so culpable a fault.

But it is not so easy to see how any such circumstances or any of the others mentioned could prevent a tow from breaking apart or prevent it from drifting upon the rocks after it had parted from the towing steamer or prevent the towing steamer from drawing the tow upon the rocks, the rocks themselves not being beaconed by any lights, and hence the immateriality of all these facts might well be assumed until the contrary was shown. Hence the rules deduced from the cases of colliding vessels do not seem applicable.

After the tow parted and the plaintiff's barge was drifting near the rocks it does indeed seem plausible that, with a competent master on board and with such vigilant and well-directed action as such a master might have taken, the collision with the rocks might have been averted or its force broken; or if this were impracticable that after the hole was made in the bottom of the barge more effective efforts might have been taken to prevent the leak; or if this were impracticable that the experience and prudence of the master would have suggested that the plaintiff's barge be run ashore at some safe point and not suffered to take the risk in her unseaworthy condition of resuming her place in the tow.

Was the plaintiff guilty of negligence in any of these respects? Judged by the event it is easy to say yes, but the defendant's conduct or the conduct of his servants is to be judged in the light of the circumstances as they then existed, and the circumstances were not favorable to the wisest determination.

372 It was a mistake for the barge to proceed, but it was necessary to decide and decide promptly, and it was impracticable to delay the tow until a careful examination could be had and the extent of the damage deliberately estimated; and if the error in judgment is properly attributable to the unfavorable situation for good judgment caused by the defendant's negligence, the mistake in judgment also lies at the defendant's door. And so the court instructed the jury. Sautter *v.* N. Y. C. & H. R. R. R. Co., 66 N. Y., 50; Lyons *v.* Erie Railway, 57 *ib.*, 489.

It cannot be said as a matter of law, under the circumstances, that the mistake in judgment in allowing plaintiff's barge to proceed was *per se* negligence; at best it was a question for the jury. Harris *v.* Nebelhoer, 75 N. Y., 169.

Most of the exceptions of the defendant rest upon the questions above discussed. The agreement to arbitrate only referred to the amount of damages, and was not a withdrawal of the case from the jurisdiction of the court.

The defendant did not offer to prove that the boatmen had substituted other lines in place of those accepted by the defendant. He only offered to prove that such occurrences sometimes took place, a fact absolutely improper in itself, since its admission would im-

ply that the jury, without further evidence, were at liberty to suppose it had occurred in this case.

The judgment and order should be affirmed with costs.

Learned, P. J., Bockes, J., concur.

373 ALBANY COUNTY, *ss:*

Worthington Frothingham, being duly sworn, says he was defendant's counsel upon the motion for a new trial herein, and that Justice Westbrook delivered no written opinion upon the decision of said motion.

W. FROTHINGHAM.

Sworn before me February 3, 1885.

WALTER D. FROTHINGHAM,
Commissioner of Deeds.

374 Supreme Court, Columbia County.

JOHN SALISBURY, Plaintiff,
against
SCHUYLER STEAM TOW-BOAT LINE, Defendant.

STATE OF NEW YORK, *Columbia County,* } *ss:*

Samuel B. Coffin, being duly sworn, deposes and says that he is managing clerk in the office of Cady & Hoysradt, No. 8 South 4th St., Hudson, N. Y., the attorneys for the plaintiff herein; that on the 31st day of January, 1888, he filed in the clerk's office of Columbia county, N. Y., the record in the above-entitled action, remitted in due form — the court of appeals upon the affirmance by said court of the judgment of the general term of the supreme court in said action entered in the office of the said clerk of Columbia county on the 21st day of October, 1885.

SAM'L B. COFFIN.

Sworn to before me this 31st day January, 1888.

JO. C. FERGUSON,
Notary Public, Col. Co., N. Y.

375 At a special term of the supreme court, held in and for the county of Rensselaer, at the supreme court chambers, on the 2d day of February, 1888.

Present: Hon. C. R. Ingalls, justice supreme court.

JOHN SALISBURY, Plaintiff,
against
SCHUYLER STEAM TOW-BOAT LINE, Defendant.

The above-named defendant having appealed to the court of appeals from the judgment of the general term of this court, entered

in this action on the 21st day of October, 1885, affirming the judgment entered therein on the 11th day of October, 1884, in the office of the clerk of the county of Columbia, and the court of appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment entered for the plaintiff, with costs, and the record remitted from the court having been filed, now, on reading and filing the affidavit of Samuel B. Coffin, and on motion of Cady & Hoysradt, attorneys for the plaintiff, it is—

Ordered that the said judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the judgment entered herein on the 21st day of October, 1885, be, and the same is hereby, affirmed, and that judgment of this court be entered herein affirming said judgment, with costs of said appeal against the defendant, to be taxed.

Enter in Columbia county.

C. R. INGALLS,
Jus. Sup. Court.

376 [Endorsed:] Supreme court. John Salisbury *v.* Schuyler Steam Tow-Boat Line. Order for judgment. Cady & Hoysradt, attorneys for —— ——; office and post-office address, No. 8 South Fourth street, Hudson, N. Y. Columbia Co. clerk's office. Filed Feb. 2, 1888. —— ——, Esq., attorney for —— ——.

377 Supreme Court, Columbia County.

JOHN SALISBURY, Plaintiff,
against
SCHUYLER STEAM TOW-BOAT LINE, Defendant.

The above-named defendant having appealed to the court of appeals from the judgment of the general term of this court, entered in this action on the 21st day of October, 1885, affirming the judgment entered therein on the 11th day of October, 1884, in the office of the clerk of the county of Columbia, and the court of appeals having heard said appeal and ordered and adjudged that the judgment appealed from be affirmed and judgment rendered for the plaintiff, with costs, and the record remitted from that court having been filed and an order having been entered thereon making the judgment of the court of appeals the judgment of this court and directing the entry of a judgment of affirmance herein, with the costs of said appeal against the defendant, to be taxed, now, on motion of Cady & Hoysradt, attorneys for the plaintiff, it is—

Adjudged that the judgment in this action entered on the 21st day of October, 1885, be, and the same hereby is, affirmed.

And it is further adjudged that the plaintiff recover of the defendant the sum of one hundred and fifty-seven dollars and eighty-
378 two cents ($157.82), the amount of his costs herein as taxed, and that he have execution against said defendant therefor.

WM. S. HALLENBECK, *Clerk.*

379 [Endorsed:] Supreme court, Columbia county. John Salisbury ag'st Schuyler Steam Tow-Boat Line. Judgment. Cady & Hoysradt, attorneys for plaintiff; office and post-office address, No. 8 South Fourth street, Hudson, N. Y. Columbia Co. clerk's office. Filed Feb. 10, 1888, 1.45 p. m.

Endorsed on cover: New York supreme court. No. 91. Schuyler's Steam Tow-Boat Line, plaintiff in error, *vs.* John Salisbury. 13069. Filed September 7, 1888.

FILED
OCT 12 1891

SUPREME COURT OF THE UNITED STATES.

No. 91.

SCHUYLER STEAM TOW BOAT LINE,

Plaintiff in error,

against

JOHN SALISBURY,

Defendant in error.

BRIEF OF PLAINTIFF IN ERROR.

WORTHINGTON FROTHINGHAM,

Counsel for Plaintiff in error.

N. S. Supreme Court.

No. 91.

SCHUYLER STEAM TOW BOAT LINE,
Plff in Error,

AGAINST

JOHN SALISBURY,
Deft in Error.

Motion by defendant to dismiss writ of error on ground of insolvency of sureties.

BRIEF OF PLAINTIFF IN ERROR.

First.

The motion papers were not served until about October 6th and not three weeks before motion.

Rule 6, Subdiv. 3.

Second.

The defendant has not served his brief or argument.

Same Rule.

Third.

The motion is founded upon gossip in the shape of a report of a merchantile agency at to the surety Wolcott. He would desire to be relieved from further responsibility and therefore will not support his credit, nor can the plaintiff on this motion compel him to do so.

Fourth.

The insolvency of the sureties might under some circumstances be ground for modifying the stay of execution, but it affords no ground for dismissing the writ of error.

Fifth.

If the Court should modify the stay upon such ground it should also provide that the defendant be estopped from pursuing the sureties hereafter.

WORTHINGTON FROTHINGHAM,
Counsel for Plaintiff in error.

Office Supreme Court U. S.
FILED.
OCT 13 1891
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 91.

SCHUYLER'S STEAM TOW-BOAT LINE, PLAINTIFF IN ERROR,

vs.

JOHN SALISBURY.

MOTION FOR ORDER DIRECTING NEW SURETIES ON BOND IN ERROR, &c.

J. RIDER CADY,
For Defendant in Error.

1 Supreme Court of the United States.

SCHUYLER'S STEAM TOW-BOAT LINE, Plaintiff in Error,
against
JOHN SALISBURY, Defendant in Error.

U. S. A., NORTHERN DISTRICT OF NEW YORK, *Columbia County,* } *ss:*

J. Rider Cady, being duly sworn, deposes and says that he is over twenty-one years of age; that he resides at the city of Hudson, in said county and State; that on the 3rd day of October, 1891, at No. 69 State street, in the city of Albany, N. Y., that being the office address given by Worthington Frothingham, Esq., attorney for the plaintiff in error herein, he personally served upon the said Worthing- Frothingham, Esq., the annexed notice of motion, affidavit, and schedules thereto attached by delivering a copy of each thereof to a person of suitable and mature age then occupying said office, and who stated that he occupied and used the said office, and that he would deliver the said papers to the said Frothingham, and that the said Frothingham was absent from said office attending court at Schoharie; that deponent does — know the name of said person, but has repeatedly seen him before at said office.

J. RIDER CADY.

Sworn to before me this 5th day of October, 1891.
RICHARD B. ALDCROFTT, JR.,
Com'r of Deeds, Hudson, N. Y.

2 United States Supreme Court.

SCHUYLER'S STEAM TOW-BOAT LINE, Plaintiff in Error,
against
JOHN SALISBURY, Defendant in Error.

SIR: Take notice that upon the writ of error heretofore allowed herein from this court by Mr. Justice Blatchford, and upon all the papers served by you in behalf of the plaintiff in error and proceedings herein subsequent to the allowance of said writ of error, and upon the bond or obligation herein executed by Samuel Schuyler and Thomas V. Wolcott on the 4th day of February, 1888, a copy of which is hereto annexed, marked Schedule D, and upon the affidavit of J. Rider Cady, Esq., and the several Schedules "A, B, and C," thereto annexed and herewith served, I shall move, before this honorable court, on the 12th day, the second Monday, of October, 1891, in the October term, 1891, at the Supreme Court room, in the Capitol, in the city of Washington, D. C., at the opening of court on that day or as soon thereafter as counsel can be heard, for an order directing the plaintiff in error herein, Schuyler's Steam Tow-Boat Line, to furnish, file, and serve forthwith or at such time as the honorable court may direct a new, adequate, and sufficient bond or obligation in error, with at least two solvent and sufficient obli-

gors or sureties making and executing the same, who shall justify respectively in the sum of fifteen thousand dollars upon due and timely notice to the attorney for the defendant in error, and
3 that in default of the furnishing, filing, and serving of such a bond or obligation in the manner and time to be ordered by the court the writ of error herein and all the proceedings of the plaintiff in error thereunder be dismissed, and that the defendant in error have judgment affirming the judgments of the courts of the *the* State of New York in favor of the said John Salisbury, the defendant in error, and against Schuyler's Steam Tow-Boat Line, the plaintiff in error, upon the rendering of which said writ of error was sued out and allowed, and for such other or further relief as this honorable court shall deem just and lawful, with such costs as it shall deem just and lawful. Dated the 2nd day of October, 1891.

J. RIDER CADY,
Attorney for the Defendant in Error, No. 12 South Fourth Street, Hudson, N. Y.

To Worthington Frothingham, Esq., attorney for the plaintiff in error.

4 Supreme Court of the United States.

SCHUYLER'S STEAM TOW-BOAT LINE, Plaintiff in Error,
against
JOHN SALISBURY, Defendant in Error.

U. S. A., *Northern Dist. of New York:*

STATE OF NEW YORK, *Columbia County,* } *ss:*

J. Rider Cady, being duly sworn, deposes and says:

First. That he is an attorney and counsellor at law, duly authorized to practice in all the courts of the State of New York, and that he is also an attorney and counselor of the Supreme Court of the United States; that he resides and practices his profession at the city of Hudson, in the county of Columbia and State of New York, and that he is the attorney of record in this court in the above-entitled action for the defendant in error; that, as he is informed by James H. McKenney, the clerk of this court, and verily believes, the above-entitled action is and will be No. 91 on the docket of this court for the October term of 1891.

Second. That heretofore and on or about the 6th day of February, 1888, a writ of error from this court, directed to the supreme court of the State of New York, was allowed by Mr. Justice Blatchford upon a judgment in said supreme court of the State of New York, in an action therein in which the above-named John Salisbury was plaintiff and the above-named Schuyler's Steam Tow-Boat
5 Line was defendant, in favor of said Salisbury and against said Schuyler's Steam Tow-Boat Line for the sum of $6,360.37

or thereabouts, damages and costs; that a copy of said writ and of certain assignments in error, order of supersedeas, and citation in said action was served upon the firm of Cady & Hoysradt, of which deponent then was and now is a member, the attorneys of record in said State court for the said John Salisbury, the defendant in error here, on or about the 10th day of February, 1888.

Third. That the said cause has not been reached for argument upon the writ of error in this court.

Fourth. That the bond given by the said plaintiff in error upon the allowance of the said writ of error was and is in the penal sum of fifteen thousand dollars ($15,000), and that the obligors and sureties thereon were Samuel Schuyler, then and now residing in the city of Albany, New York, and Thomas V. Wolcott, then residing in said Albany, and that each thereof justified in the sum of fifteen thousand dollar- ($15,000) over and above all debts and liabilities which he owed or had incurred, exclusive of property exempt by law from levy and sale upon execution.

Fifth. That the said plaintiff in error has never furnished nor tendered any other bond, security, or obligation to the defendant in error nor on his behalf nor for his benefit upon the appeal taken by said writ beside the bond aforementioned.

Sixth. That, as deponent is informed and verily believes, the said plaintiff in error, The Schuyler's Steam Tow-Boat Line, was
6 at the date of the allowance of said writ of error a corporation organized and doing business under the laws of the State of New York in towing vessels for hire upon the waters of the Hudson river and adjacent bays and waters, and that the said corporation has gone out of existence or has been succeeded by another corporation known as Schuyler Steam Tow-Boat Line, likewise organized under and in pursuance of the laws of the State of New York and engaged, until recently, in towing vessels for hire upon the waters aforesaid, and that said latter and new corporation has succeeded to the rights and property of and assumed or incurred the obligations and liabilities of the said plaintiff in error, Schuyler's Steam Tow-Boat Line; and that, so far as deponent is informed and verily believes, the said plaintiff in error, if it has still any corporate existence, is insolvent and not possessed of any tangible property or estate sufficient to pay the judgment in favor of the said defendant in error in case the said judgment should be affirmed or the said writ of error should be dismissed by this court.

Seventh. That as appears by a certain petition in writing, signed by Samuel Schuyler, James B. Schuyler, F. W. Vosburgh, Lemuel J. Hopkins, and Thomas V. Wolcott, all of the trustees of the said Schuyler Steam Tow-Boat Company, verified by them respectively on the 31st day of July, 1891, addressed to the supreme court of the State of New York, and filed in the office of the clerk of said court in and for the county of Albany, in said State, on the 1st day of August, 1891, and from certain schedules thereto annexed, a duly certified copy whereof and of the order granted by Hon. William
L. Learned, a justice of said supreme court of the State of
7 New York, at his chambers, in the city of Albany, on the 31st

day of July, 1891, upon the presentation of said petition, is hereto annexed, marked "Schedule A," the said Schuyler Steam Tow-Boat Company is, as deponent is informed and verily believes, insolvent and unable to pay its just debts and liabilities, and that it is in the hands of a temporary receiver, and that proceedings for its dissolution are pending.

Eighth. That, as deponent is informed and verily believes, one Frank D. Sturges was, on the 31st day of July, 1891, appointed temporary receiver of the property of said Schuyler Steam Tow-Boat Company by the aforementioned order of Mr. Justice Learned, and that he thereupon entered upon the performance of his duties as such receiver and is still so engaged; that, as deponent is informed and verily believes, and as appears from the petition of the said Frank D. Sturges, said receiver, verified on the 9th day of September, 1891, filed in the office of the clerk of the supreme court of the State of New York, in the county of Albany, September 12, 1891, he, the said receiver, intends to carry on the litigation in this cause in this court on behalf of the plaintiff in error, and to use funds coming into his hands as such receiver for that purpose. Reference is hereby made to a certified copy of said petition and of an order granted thereon by the supreme court of the State of New York, at a special term thereof held at the court-house, in the city of Albany, on the 12th day of September, 1891—present, Hon. William L. Learned, justice—which said copy is marked "Schedule B."

Ninth. That, as deponent is informed and believes, the said
8 Samuel Schuyler, one of the sureties upon the bond furnished by the plaintiff in error upon suing out the writ of error in this cause in this court, which said bond is specifically referred to in the fourth subdivision hereof, has become and now is insolvent and unable to pay his debts and bankrupt; that, as deponent is informed and believes, the said Schuyler did on or about the fourth day of August, 1891, make, execute, and deliver to one George W. Kirchwey a general assignment of his property for the benefit of his creditors under the laws of the State of New York; that such general assignment was recorded in the office of the clerk of Albany county August 5th, 1891, at 9 h. 13 m. a. m., in Liber 429 of Deeds, at page 199, &c., and that a copy of said general assignment is hereto annexed, marked "Schedule C;" that, as deponent is informed and believes, the estate of the said insolvent is now in process of liquidation.

Tenth. That while deponent has no actual and definite knowledge as to the present financial situation of the said Thomas V. Wolcott, the other surety upon said bond, he has recently been informed by R. G. Dun & Co., a reputable and reliable commercial agency doing business, among other places, at Albany and Troy, that "he (the said Wolcott) is one of the trustees of the Schuyler Steam Tow-Boat Company and has been identified with its affairs and those of its predecessors for many years and held the position of secretary of the company. He resides at Waterford N. Y., where he did own quite a valuable piece of property, but it is understood that the title thereto has changed hands, and that at present he possesses nothing of a tangible character, evidently having put

his affairs in their present condition anticipating the difficulties the tow-boat company is now in."

That on the 29th day of September, 1891, deponent received a further report upon the financial condition of the said Thomas V. Wolcott, of which the following is a copy, to wit:

"Wolcott, Thos. V., Waterford, N. Y., Sar. Co."

"Sept. 25, 1891.—A search of the county records in regard to his real estate develops the following: No deed from him since Jan. 1, '91; mortgage Thos. V. Wolcott & wife to Thomas Breslin, dated Jan. 24, '90, $6,000; mortgage Thos. V. Wolcott and wf. to Jennie Campbell, dated March 2, '91, $5,000; mortgage Thomas V. Wolcott & wf. to Smith Marshall, dated Aug. 1, '91, $2,000.

Sept. 28, '91.—It is noticed by assessment book of town of Waterford that 204 acres were assessed in the year 1889 and 1890 at $9,180 in the name of Sarah A. Wolcott; perhaps it was assessed to the estate and so continued down in that way on assessment-roll; think Thomas V. Wolcott claims ⅓ interest in the farm at Waterford."

"R."

J. RIDER CADY.

Subscribed and sworn to before me this 2 day October, 1891.

[Seal W. Frank Holsapple, Notary Public, Columbia Co., N. Y.]

W. FRANK HOLSAPPLE,
Notary Public, Col. Co., N. Y.

"SCHEDULE A."

At a special term of the supreme court held at chambers at the city hall, in Albany, on the 31st day of July, 1891.

Present: Hon. William L. Learned, justice supreme court, Albany county.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

On reading and filing the petition of Samuel Schuyler, James B. Schuyler, Francis W. Vosburgh, Lemuel J. Hopkins, and Thomas V. Wolcott, verified the 31st day of July, 1891, and the schedules thereto attached, and due proof of service of notice of this application upon the attorney general of the State of New York, after hearing James W. Eaton, Esq., on behalf of the petitioners and said attorney general appearing and consenting thereto—

It is ordered that all persons interested in the corporation known as Schuyler Steam Tow-Boat Company show cause before John A. Delehanty, Esq., a referee, who is hereby appointed for that purpose, at his office, in the city of Albany, on the 16th day of November, 1891, at 10 o'clock in the forenoon of that day, why the corporation

Schuyler's Steam Tow-Boat Company should not be dissolved; it is further—

Ordered, on motion of the petitioners, that Frank D. Sturges, of the city of New York, be, and he is hereby, appointed a temporary receiver of the property of the said corporation with all the
12 powers and subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section 1,788 of the Code of Civil Procedure.

It is further ordered that all creditors of said corporation be, and they are hereby, restrained and enjoined from bringing any actions against the said corporation for the recovery of a sum of money and from taking any further proceedings in any action already commenced against the said corporation for such purpose.

It is further ordered that a copy of this order be published at least once in each of the three weeks immediately preceding the time above fixed, to wit, the 16th day of November, 1891, for showing cause, in the newspaper printed at Albany in which legal notices are required to be published, to wit, the Albany Argus, and also in the Albany Times, a newspaper printed and pub-
13 lished in the city of Albany, county of Albany and State of New York, and that a copy of this order be served upon each of the several persons specified in the schedule attached to the petition in this matter as a creditor or stockholder of the corporation or as a person to whom an engagement of the corporation is to be performed other than a person whose residence is stated to be unknown or to be without the *the* United States, such service to be made either personally at least twenty days before the time appointed for the hearing or by deposoiting a copy of the order at least forty days before the time so appointed in the post office, enclosed in a post-paid wrapper, and addressed to the person to be served, at his residence, as stated in the schedule.

It is further ordered that before entering upon the execu-
14 tion of his duties as such receiver the said referee do make, execute, and acknowledge in due form of law his bond in the penal sum of fifty thousand dollars to the people of the State of New York in accordance with the practice of this court and the statute relating thereto, in which bond two sureties shall join, who shall each acknowledge said bond and justify in the sum of one hundred thousand dollars over and above all their just debts and property exempt by law from execution, which bond shall be conditioned for the faithful execution of the trusts reposed in the said receiver and for his due accounting for all property and money which shall come into his hands as such receiver, and shall be filed in the office of the clerk of the county of Albany.

Enter Albany Co.

WM. L. LARNED,
Justice Supreme Court.

15 I do hereby consent to the appointment of Frank D. Sturges, Esq., of New York city, as temporary receiver herein.

Dated Albany, July 31, 1891.

CHAS. F. TABOR,
Att'y Gen'l.

Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

To the honorable the attorney general of the State of New York:

Notice is hereby given that upon the annexed petition and
16 schedules an application will be made to the supreme court of the State of New York, at a term thereof to be held at —— on the — day of ——, 1891, at — o'clock in the — noon, that the prayer of said petition be granted, and that an order be made in accordance therewith requiring all persons interested in the corporation therein mentioned to show cause as in said petition stated, and appointing a receiver thereof, and enjoining the bringing of any further actions against the said corporation and any further proceedings in actions already brought against it, and for such other or further order or relief in the premises as may be proper.

17 Supreme Court, Albany County.

In the Matter of a Petition of the Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

To the honorable the supreme court of the State of New York:

The petition of Samuel Schuyler and James B. Schuyler, Lemuel J. Hopkins, Thos. V. Wolcott, all of the city and county of Albany, and of Francis W. Vosburgh, of the city and county of New York, in the State of New York, respectfully shows to this honorable court that they are all of the trustees who have the management of the concerns of the corporation created by and under the laws of the State of New York, to wit, chapter 40 of the Laws of 1848
18 and the several acts amendatory thereof and supplementary thereto, and known by the name and designation of Schuyler's Steam Tow-Boat Company, which said corporation has its principal office in the city of Albany, county of Albany and State of New York, and is engaged in the business of towing vessels, &c., by steam-power for hire, and that your petitioners are owners and holders of seven-tenths ($\frac{7}{10}$) of the capital stock of said corporation.

That your petitioners have discovered that the stock, effects, and other property of said corporation are not sufficient to pay all just demands for which it is liable, nor are they sufficient to afford reasonable security to those who may deal with it, for the following reasons, to wit:

That, as will be seen from the schedule hereto attached,
19 this corporation is indebted to the Holland Trust Company of New York in a large sum of money on a demand loan; that payment of said loan has been demanded and insisted upon, and that there are no available assets to meet the same; that the said corporation has already defaulted upon the claims of J. F. Schmidt and of William Wall's Sons, set forth in the annexed

schedule, which was secured by notes, which notes have been presented for payment and payment refused, for the reason that the company had no available assets with which to pay the same.

That other claims set forth in the schedule are either due or rapidly becoming due, and that there is serious danger of the company's vessels, constituting the sole property of the said company, being libelled in the admiralty courts of the United States
20 for such claims as constitute maritime liens, including the claims for services and supplies rendered to said vessels.

That in the event of said vessels being libelled and sold under a decree in admiralty there would be little hope of realizing the value of said vessels on such sale, and the security of creditors and stockholders would be seriously imperilled.

That it is impossible out of the available assets of the said corporation to pay the amount of the claims set forth in the annexed schedule or any one of them, and the same will have to be realized upon a sale of the chattels and property of the company, which are insufficient to pay all claims in full.

That the cash capital of the said corporation is insufficient to enable it to continue its business.

That it is beneficial, in the judgment of your petitioners,
21 to the interest of the stockholders of said corporation that said corporation should be dissolved.

That according to the best of the knowledge of your petitioners, and so far as your petitioners have the means of knowing the same, the schedule hereto attached contain- :

1. A full and true account of all the creditors of the corporation and of all unsatisfied engagements entered into by and subsisting against the corporation.

2. A statement of the name and place of residence of each creditor and of each person with whom such an engagement was made and to whom it is to be performed, if known, or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor or other
22 person specified in the last subdivision and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just, and true inventory of all the property of the corporation and of all the books, vouchers, and securities relating thereto.

6. A statement of each encumbrance upon the property of the corporation by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder, his residence, if it is known, or, if it is not known, stating that fact, the number of shares belonging to him, the amount paid in upon his shares, and the amount still due thereupon.

Wherefore your petitioners ask that this honorable court
23 will make an order requiring all persons interested in the corporation to show cause before it or before a referee desig-

nated in the order, at a time and place therein specified, not less than three months after the granting of the order, why the said corporation should not be dissolved, and that a temporary receiver of the property of the corporation, who shall have all the powers and be subject to all the duties which are defined as belonging to temporary receivers appointed in an action in section 1788 of the Code of Civil Procedure, may be appointed, and that an injunction may be granted restraining the creditors of the corporation from bringing any action against the said corporation for the recovery of any sum of money or from making any further proce-dings in any such action heretofore commenced, and that your petitioners may
24 have such other and further order or relief in the premises as may be just.

SAMUEL SCHUYLER.
J. B. SCHUYLER.
F. W. VOSBURGH.
LEMUEL J. HOPKINS.
THOMAS V. WOLCOTT.

STATE OF NEW YORK, } ss:
Albany City and County, }

Samuel Schuyler, James B. Schuyler, and Francis W. Vosburgh, Lemuel J. Hopkins and Thomas V. Wolcott, being each duly severally sworn, each for himself says that he is a trustee of Schuyler's Steam Tow-Boat Company; that he has read the foregoing petition subscribed by him and the schedules thereto attached, and knows the contents thereof, and the same are just and true so far as this affiant knows or has the means of knowing the same.

25

SAMUEL SCHUYLER.
J. B. SCHUYLER.
F. W. VOSBURGH.
LEMUEL J. HOPKINS.
THOS. V. WOLCOTT.

Subscribed and sworn to before me this 31st day of July, 1891.

CHARLES F. BRIDGE,
Com. of Deeds, Albany, N. Y.

SCHEDULE.

Liability to Creditors and Unsatisfied Engagements.

Name.	Residence.	Cause of debt.	Nature of debt.	Amount.
1st. Nat. bank	Albany	Loan	Note	2,500
South End b'k	Albany	Loan	Note	2,000
D. & H. Canal Co	N. Y	Coal	Note	14,541 06
Lehigh Valley Coal. Co	N. Y	Coal	Note	33,500
1st Nat. b'k	Albany	Loan	Note	3,000
1st Nat. b'k	Albany	Loan	Note	5,000
Smith Marshall	Coxsackie	Loan	Note	5,000
C. A. Bailey	Bath	Services	Note	311 85
Jennie Campbell	Albany	Purchase of stock	Note	891 41
M. Moran	New York	Tug hire	Note	2,000
M. Moran	New York	Tug hire	Note	2,000
S. W. Schuyler	Albany	Loan	Note	10,993 32
J. W. Russell	Albany	Loan	Note	2,000
Downing & Lawrence	N. Y	Repairs	Note	2,000
Downing & Lawrence	N. Y	Repairs	Note	500
City Nat. b'k	Albany	Loan	Note	300
Clinton Robinson	West Troy	Tug hire	Note	1,700
L. J. Hopkins	Albany	Supplies	Note	3,500
26 Downing & Lawrence	N. Y	Repairs	Note	1,0 0
Downing & Lawrence	N. Y	Repairs	Note	1,000
Endicott & Co	Jersey City	Supplies	Note	1,200
S. W. Schuyler	Albany	Loan	Note	1,700
S. W. Schuyler	Albany	Loan	Note	2,000
S. W. Schuyler	Albany	Loan	Note	300
S. W. Schuyler	Albany	Loan	Note	434 52
Morris & Smith	Greenbush	Coal	Note	636
C. Robinson	West Troy	Tug hire	Note	1,500
1st Nat. b'k	Albany	Loan	Note	3,000
Est. J. P. Robinson	N. Y	Wharfage	Note	2,264 35
R. K. Townsend	Albany	Repairs	Note	151 16
Welsh & Grey	Albany	Supplies	Note	344 95
S. B. Dayton	Brooklyn	"	Note	443
Morris & Smith	Greenbush	Coal	Note	600
1st Nat. b'k	Albany	Loan	Note	2,000
1st Nat. b'k	Albany	Loan	Note	3,000
Garfield Nat. b'k	N. Y	Loan	Note	2,500
Monitor Ice Co	Albany	Ice	Note	450
Divine Burtis, Jr	B'klyn	Repairs	Note	1,200
1st Nat. b'k	Albany	Loan	Note	3,000
Huber & Hartnett	Albany	Supplies	Note	200
Wm. Wall's Sons	N. Y	Supplies	Note	1,346 25
Weed, Parsons & Co	Albany	Printing	Note	550
1st Nat. b'k	Albany	Loan	Note	2,500
Garfield Nat. b'k	N. Y	Loan	Note	5,000
Garfield Nat. b'k	N. Y	Loan	Note	2,500
1st Nat. b'k	N. Y	Loan	Note	10,000
27 J. P. Robinson	New York	Wharfage	Note	420 55
Pioneer Iron W'ks	N. Y	Repairs	Notes	3,355 20
C. Robinson	West Troy	Tug hire	Notes	2,300
1st Nat. b'k	Albany	Loan	Note	1,500
Thos. V. Wolcott	Albany	Loan	Note	800
Pendlington Iron W'ks	B'klyn	Repairs	Note	573 10
Garfield Nat. b'k	N. Y	Loan	Note	1,000
Garfield Nat. b'k	N. Y	Loan	Note	5,000
Jno. R. Morrill	Albany	Repairs	Note	330
D. C. Hayner	Greenbush	Tug hire	Note	2,914 35
Jno. Fisher & Sons	Albany	Repairs	Note	155
Welsh & Grey	Albany	Repairs	Note	207 44
Jno. F. Schmidt	B'klyn	Board of crews	Note	124 32
Jennie Campbell	Albany	Purchase of stock	Note	4,273 59
1st Nat. b'k	Albany	Loan	Note	2,500
Holland Trust Co	N. Y	Loan	Note	53,873 21
S. V. R. Ableman	Albany	Wages	Book acc't	575
Tug G. H. Sharpe	Albany	Services	Bill rendered	95 50
Tug C. S. Many	Albany	Services	Bill rendered	31 50
Tug Lafayette	Troy	Services	Bill rendered	104
Tug Geo. Vail	Troy	Services	Bill rendered	32 50
Tug Willie	Selkirk	Services	Bill rendered	149 70
Sam'l Metcalf	B'klyn	Repairs	Book acc't	86 80
Murphy & Liscomb	Albany	Supplies	Book acc't	167 28
Henry B. Craig	Greenbush	Wages	Book acc't	810
L. J. Hopkins	Albany	Supplies	Book acc't, est	6,449 01
Jno. J. Dolphin	Albany	Supplies	Book acc't (about)	350
Ackerman & Frothingham	Albany	Supplies	Book acc't	218 93
S. B. Dayton	B'klyn	"	Book acc't	424 63
28 Huber & Hartnet	Albany	Repairs	Book acc't	232
Lehigh Valley Coal Co	N. Y	Coal	Book acc't	7,009 32
Deitz & Son	Albany	Supplies	Book acc't	179
Van Heusen, Chas., & Co	Albany	Supplies	Book acc't	44 69
New Jersey St. B't Co	N. Y	Wharfage	Book acc't (est.)	1,356 67

Liability to Creditors and Unsatisfied Engagements—Continued.

Name.	Residence.	Cause of debt.	Nature of debt.	Amount.
M. Moran	N. Y.	Service of tugs	Book acc't (est.)	54 33
Jas. Mullens	N. Y.	Supplies	Book acc't	460
John Oliver	N. Y.	Wages	Book acc't	410
Tug Thos. Chubb	Greenbush	Services	Bill rendered	1,500
Patrick Eagan	Albany	Repairs	Book acc't	45 99
A. N. Reynolds & Co	N. Y.	Supplies	Book acc't	14
A. & W. Fletcher & Co.	Hoboken	Repairs	Book acc't	131 76
Henry C. Butt	Loudenville	Wages	Book acc't	586
Jas. A. Sands	Albany	Wages	Book acc't	1,895 75
H. N. Temple	Albany	Wages	Book acc't	693
Sylvester Shook	Lansingburgh.	Wages	Book acc't	697
Wm. Wall's Sons	N. Y.	Supplies	Book acc't	1,100
Wm. Walker	Coxsackie	Wages	Book acc't	678
Breslin Bro	Albany	Repairs	Book acc't	309 53
Downing & Lawrence	B'klyn	Repairs	Book acc't	1,723 56
D. H. McCallan	Albany	Supplies	Book acc't	70 50
M. G. Stoneman & Son	Albany	Supplies	Book acc't (est.)	160
S. S. Walsh	Albany	Repairs	Book acc't	68 12
Endicott & Co	Jersey City	Supplies	Book acc't	323 77
W. A. Thompson	Brooklyn	Repairs	Book acc't	121 63
Riley & Conley	Brooklyn	Repairs	Book acc't	440 89
Frank Clarke	Brooklyn	Repairs	Book acc't	194 68
Leonard & Youngman	Albany	Coal	Book acc't (est.)	1,200
29 Est. J. P. Robinson	N. Y.	Wharfage	Book acc't	500
Theo. Smith & Bro	Jersey City	Repairs	Book acc't	36 12
M. Elsser	Brooklyn	Repairs	Book acc't	144 66
Jno. Fisher & Son	Albany	Repairs	Book acc't	70 81
Lerons & Boyer	Albany	Dry dock	Book acc't	73 57
James Gould & Co	Albany	Wharfage	Book acc't	50
A. V. De Witt, ex'r	Albany	Wharfage	Book acc't	25
Croton Water Co	N. Y.	Water	Book acc't	110
State of N. Y.	Albany	Taxes	Book acc't	150
M. Kramrath	Albany	Supplies	Book acc't	30 95
Argus Co	Albany	Subscription	Book acc't	10
Weed, Parsons & Co	Alb'y	Printing	Book acc't (est.)	50
W. M. Witber	Albany	Wood	Book acc't	28 75
Hudson River Tel. Co	Albany	Telephone	Book acc't	45
P. J. Sweeney	Albany	Repairs	Book acc't	10 73
P. H. Lathrop	Albany	Supplies	Book acc't	66 25
Blume & Jelinck	Albany	Repairs	Book acc't	2 05
F. Schimp & Son	Albany	Repairs	Book acc't	21 70
Monitor Ice Co	Albany	Ice	Book acc't (est.)	400
Ætna Ins. Co	N. Y.	Insurance	Book acc't	2,812 50
Reynolds & Spink	Pok'sie	Coal	Book acc't	151 42
Ackerman Deyo & Hillard	N. Y.	Insurance	Book acc't	290 50
Frank E. Fitts	Boston	Supplies	Book acc't	81 86
S. S. Baker & Co	New York	Supplies	Book acc't	113 12
County of Albany	Albany	Taxes	Book acc't	841 33
F. S. Marvel & Co	Newburgh	Repairs	Book acc't	150 47
Tug Florence	Albany	Services	Bill rendered	376
Z. Jaques	N. Y.	Rent	Book acc't	862 50
30 Reynolds & Spink	Pok'sie	Coal	Book acc't	151 42
Lehigh Valley Coal Co	N. Y.	Coal	Book acc't	2,500

Crews, Steamers.

America	Unknown	Wages	Book acc't	
Belle	Unknown	Wages	Book acc't	
Syracuse	Unknown	Wages	Book acc't	
Vanderbilt	Unknown	Wages	Book acc't	
Leonard	Unknown	Wages	Book acc't	
Carrie	Unknown	Wages	Book acc't	
Winants	Unknown	Wages	Book acc't	
Niagara	Unknown	Wages	Book acc't	
Connecticut	Unknown	Wages	Book acc't (est.)	4,500
Louis Cohen	N. Y.	Repairs	Book acc't (est.)	2,000
Davis & Barr	N. Y.	Repairs	Book acc't "	2,000
James B. Schuyler	Albany	Service of tugs	Book acc't (est.)	79,523 15
F. W. Vosburgh	New York	Services	Book acc't	3,000
J. B. Schuyler	Albany	Salary	Book acc't	900
Samuel Schuyler	"	Service of tugs	" " estimated	7,500
S. D. M Goodman, ag't	"	Rent	" "	300
S. V. Wolcott	"	Services & supplies	" " est.	400
W. Dey, Ermand & Co	"	Supplies	" " est.	175
W. Crandall Packing Co	Palmyra	Supplies	" "	9
Jno. Fisher & Sons	Albany	"	" "	2,081
John Salisbury	Athens	Damages	Judgment (est.)	15,000
Clerk N. J. Sup. C't	Washington	Costs	Bill rendered	575
A. J. Dings	Albany	Damages to barge	Libel filed against the Niagara.	10,000

31 *Inventory of the Property of Schuyler Steam Tow-Boat Company.*

Bills receivable, nominal	$4,000 00
Cash in banks	100 00
Cash in drawers	125 00
Book accounts	11,000 00
Steam tow-boats:	
America	50,000 00
Belle	25,000 00
Connecticut	15,000 00
Niagara	35,000 00
Syracuse	50,000 00
Vanderbilt	50,000 00
J. Leonard	15,000 00
Carrie	10,000 00
G. E. Winants	10,000 00
Bonds of the company hypothecated for loans and secured by a chattel mortgage upon the above steamboats, par value	150,000

(NOTE.—The above valuations are based upon the assumption that the boats have employment as tow-boats and are employed as a fleet.)

32 *Books of Schuyler's Steam Tow-Boat Company.*

Albany office.

- Down-towing books,
- Up-towing books,
- Cash collection books,
- Help book,
- Memorandum down-towing book,
- Diary,
- Stock ledger,
- Certificates of stock,
- Individual ledger,
- Remittance,
- Minute book,
- Four check books,
- Cash book,
- Ledger book,
- Bills payable book,
- Bills receivable book,
- Towing ledger,
- Memorandum book of accounts,
- Journal.

33 New York office.

- Up-towing book,
- Two blotters,
- Cash book,
- Towing ledger,
- Miscellaneous,
- Account book,
- Two ledgers,
- Diary.

Office Furniture.

Four safes,	Albany office.
Five desks,	
Six chairs,	
Wardrobe,	
Clock,	
Charts, pictures,	
Inkstands, &c.,	
Stove.	
Two safes,	New York office.
Three desks,	
One lounge,	
One case,	
Five chairs,	
Stove,	
Pictures.	

34 *Incumbrances upon the Property of Schuyler Steam Tow-Boat Company.*

Chattel mortgage upon the steam tow-boats America, Belle, Connecticut, Niagara, Syracuse, Vanderbilt, J. Leonard, Carrie, G. E. Winants, securing bonds of the company to the amount of one hundred and fifty thousand dollars ($150,000.00).

Judgment of circuit court of U. S. for northern district of New York in favor of John Salisbury, of Athens, New York, for about $15,000.00.

(This judgment has been appealed from to U. S. Supreme Court.)

35 *Capital Stock and Stockholders of Schuyler's Steam Tow-Boat Company.*

Name.	Residence.	No. of shares.
Samuel Schuyler	Albany	707
James B. Schuyler	Albany	35
Thomas V. Wolcott	Albany	50
F. W. Vosburgh	New York	10
Divine Burtis, Jr.	Brooklyn	100
L. J. Hopkins	Albany	68
Juliette Beman	Albany	10
Geo. P. Foote	Brooklyn	20

That the to-al number of shares issued by said company was one thousand, of the par value of $100 each, and that said stock is all fully paid up.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss:

I, Ansel C. Requa, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy,

petition and order, with the original thereof, filed in this office on the 1st day of August, 1891, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Albany County, July, 1847.

In testimony whereof I have hereunto set my hand and affixed my official seal this 22 day of Sept., 1891.

A. C. REQUA, *Clerk.*

36 [Endorsed:] Supreme court. In the matter of the petition of a majority of the trustees of Schuyler's Steam Tow-Boat Company, a corporation, for its dissolution. Petition and order. J. W. Eaton, att'y for petitioners, Twedale building, Albany, N. Y. Due and personal service of notice of the within application is hereby admitted, and it is consented that said application may be made forthwith to the court at chambers and that the within order may be entered. Albany, July 31, 1891. Chas. F. Tabor, att'y gen'l. Filed and rec'd Aug't 1, 1891, 11.15 a. m.

37 SCHEDULE B.

At a special term of the supreme court of the State of New York, held at the court-house, in the city of Albany, on the 12 day of September, 1891.

Present: Hon. William L. Learned, justice.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

Upon the petition of Frank D. Sturges, duly verified September 9th, 1891, and the petition and order referred to therein, and due proof of service of notice of this application upon the attorney general of the State of New York, and after hearing James W. Eaton, Esq., counsel for the petitioner, and said attorney general appearing and consenting thereto, it is ordered that Frank D. Sturges,

38 receiver herein, be, and he hereby is, authorized and empowered to defend and contest the action now pending in the district court of the United States for the eastern district of New York brought by Albert J. Dings against the steamboat Niagara; also to pay out of the funds in his possession the fees of the clerk of the Supreme Court of the United States on the appeal thereto in the action brought by John Salisbury against Schuyler's Steam Tow-Boat Line and to prosecute said appeal, retaining, if he be so advised and deem it necessary, the counsel therein who has heretofore had charge of said action, and also to defend and contest the action now pending in the supreme court of New York brought by Thomas McLaughlin against the predecessor of the corporation of which the petitioner herein is receiver.

Enter, Albany Co.

W. L. L.

39 N. Y. Supreme Court, Albany County.

In the Matter of the Petition of a Majority of the Trustees of SCHUYLER'S STEAM TOW-BOAT COMPANY, a Corporation, for its Dissolution.

To the supreme court:

The petition of Frank D. Sturges, receiver of Schuyler's Steamboat Company, respectfully shows:

I. That heretofore and on the 31st day of July, 1891, the trustees of Schuyler's Steamboat Company, a corporation created and existing under and by virtue of the laws of the State of New York, presented to this court their petition, duly verified, with the schedules thereto attached as prescribed by law, wherein they prayed for the dissolution of said corporation and the appointment of a temporary receiver of its property.

II. That upon said petition, due notice of the application
40 being given to the attorney general of the State of New York, an order of reference was made to John A. Delehanty, Esq., of the city of Albany, and requiring all persons interested in said corporation to show cause before him at his office, in the city of Albany, on the 16th day of November, 1891, why said corporation should not be dissolved.

III. That in and by said order your petitioner was duly appointed temporary receiver of the property of said corporation, with all the powers and subject to all the duties as prescribed by section 1788 of the Code of Civil Procedure; that said order further provided for the publication thereof and for the execution and filing of the receiver's bond, to which petition and order reference is made for their contents; that said petition and order were duly filed
41 and entered in the office of the clerk of Albany county on the 1st day of August, 1891, and on the same day served upon said attorney general.

IV. That on the 4th day of August, 1891, your petitioner's bond as such receiver, duly approved by one of the justices of this court, was also filed in the office of said clerk, and your petitioner thereupon entered into and upon the discharge of his duties as such receiver.

V. That the assets of said corporation, in addition to certain steamboats with which it carried on its business of towing, consists of claims against numerous canal-boats, barges, and other vessels and their owners, aggregating several thousand dollars, although the amount for which each individual vessel is liable is small; that your petitioner has been engaged in collecting these claims, and has received therefrom upwards of $6,000.00, but there are a
42 large number of such claims still outstanding and uncollected; that in some of the cases the owner or agents of said boats have refused to pay, and in others the masters of said boats avoid attending at the office to make payment, as has heretofore been their custom while said corporation was carrying on business.

VI. And your petitioner further shows that at the time of mak-

ing said order of reference and appointment of receiver there was pending in the district court of the United States for the eastern district of New York an action brought by Albert J. Dings against the steamboat Niagara, belonging to said corporation, by libel filed in said court for $10,000.00 damages alleged to have been sustained through the negligence of said steamboat or her officers; that your petitioner is advised and believes that there is a good and
43 sufficient defence to said action, and that it is to the interest of said corporation and its creditors that the same should be contested.

VII. And your petitioner further shows that at the time of the making of said order of reference and appointment of receiver there was also pending in the Supreme Court of the United States on appeal from the court of appeals of the State of New York an action by John Salisbury against Schuyler's Steam Tow-Boat Line, of which the present corporation is the successor, for about $15,000.00; that the record therein has been printed and the clerk of said Supreme Court has rendered his bill for fees amounting to about $600.00, for which he requires payment in order that the appeal may be properly placed upon the calendar and not dismissed; that your petitioner is advised and believes that there is good and sufficient
44 grounds of appeal therein, and that it is to the interest of said corporation and its creditors that said appeal should be prosecuted, in order, if possible, to prevent an affirmance of the judgment for said amount.

VIII. And your petitioner further shows that there is an action pending in the supreme court of this State, brought by Thomas McLaughlin, claiming damages for negligence against the predecessor of said corporation (and for whose obligation this corporation may be held liable), which suit is at issue and to which, as your petitioner is advised and believes, there is good and sufficient defence, and that it is to the interest of said corporation and its creditors that the same should be contested. Your petitioner, therefore, prays the instructions of this court and that he may be authorized to
45 take such proceedings as he may be advised by action against the owners or by libel against the boats for the collection of the claims referred to in the fifth paragraph of this petition, and that he may be further authorized to contest the action brought by said Dings, as set forth in the sixth paragraph of this petition.

And that he may be further authorized to prosecute the appeal in the action brought by said Salisbury as set forth in the seventh paragraph of this petition and to pay the fees of the clerk in said action, and to retain the counsel therein, if he be so advised, who has hitherto had the charge thereof.

And that he may be further authorized to defend the action brought by said McLaughlin as set forth in the eighth paragraph of this petition.

And your petitioner will ever pray, &c.

FRANK D. STURGES,

46 *Receiver Schuyler Steam Tow-Boat Company.*

CITY AND COUNTY OF NEW YORK, *ss:*

Frank D. Sturges, being duly sworn, deposes and says that he is the petitioner in the foregoing petition named; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

FRANK D. STURGES.

Sworn to before me this 9th day of September, 1891.

THOMAS F. MURTHA,
Notary Public, New York Co. (192).

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } *ss:*

I, Ansel C. Requa, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy, petition, &c., with the original thereof filed in this office on the 12th day of September, 1891, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed my official seal this 21st day of September, 1891.

Seal Albany County, July, 1847.

A. C. REQUA, *Clerk.*

47 [Endorsed:] N. Y. supreme court, Albany county. In the matter of the petition of a majority of the trustees of Schuyler Steam Tow-Boat Company, &c. Petition and order. Jas. W. Eaton, counsel for receiver, Albany, N. Y. Filed Sept. 12, 1891.

Due notice of the within application is hereby admitted, and it is consented that said application may be made at chambers, and that the within order may be entered.

Dated Albany, Sept. 10, 1891.

CHAS. F. TABOR,
Att'y Gen'l.

48 SCHEDULE C.

This indenture, made this fourth day of August, in the year one thousand eight hundred and ninety-one, between Samuel Schuyler, residing at Selkirk, in the county of Albany, N. Y., and engaged in the tow-boat business between the cities of Albany and New York, with principal offices at No. 284 Broadway, in the said city of Albany, party of the first part, and George W. Kirchwey, of said city of Albany, party of the second part, witnesseth:

That whereas the party of the first part is indebted to divers persons in sundry sums of money which he is unable to pay in full, and is desirous of providing for the payment of the same, so far as he is able, by an assignment of all his property for that purpose:

Now, therefore, the said party of the first part, in considera-
49 tion of the premises and of the sum of one dollar to him paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto the party of the second part, his successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, claims, demands, property, and effects of every description belonging to the party of the first part, wherever the same may be situated, except such property as — exempt by law from levy and sale under an execution; to have and to hold the same unto the said party of the second part, his successors and assigns—

50 In trust, nevertheless, to take possession of and to sell the same with all reasonable despatch and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds thereof—

First. To pay and discharge all the reasonable expenses, costs, and charges of executing this trust and of carrying the same into effect, together with the lawful commission of the party of the second part for his service in executing said trust.

Second. To pay the wages or salaries actually owing to the employees of the assignor at the time of the execution of this assignment in full; and should the assets of the assignor not be sufficient to pay in full all said claims, then the assets shall be applied
51 to the payment of the same *pro rata* to the amount of each of such claims.

Third. To pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts now due or now incurred and to grow due from the said party of the first part, with interest thereon; and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities rateably and in proportion.

Fourth. After the payment of all the said debts and liabilities in full, if there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors or assigns.

52 And the party of the first part does hereby make, constitute, and appoint the said party of the second part his true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to demand, recover, and receive of and from all and every person or persons all property, debts, and demands due and owing to the said party of the first part and to give discharges for the same; to sue, prosecute, defend, and implead for the same, and to execute, acknowledge, and deliver all necessary deeds, instruments, and conveyances.

And the party of the first part hereby authorizes the said party

of the second part to sign the name of the said party of the
53 first part to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design, and purpose of this trust.

And the said party of the second part does hereby accept the trust created and reposed in him by this instrument and covenants and agrees to and with the said party of the first part that he will without delay and will faithfully execute the said trust according to the best of his skill, knowledge, and ability.

In witness whereof the parties hereto have set their hands and seals the day and year first above written.

SAMUEL SCHUYLER. [L. S.]
GEORGE W. KIRCHWEY. [L. S.]

Signed, sealed, and delivered in presence of—the words "now incurred and" interlined after the word "or" in the seventh line of the third page hereof—

CHARLES M. FRIEND.

54 STATE OF NEW YORK, } *ss:*
City and County of Albany, }

On this 4th day of August, in the year one thousand eight hundred and ninety-one, before me personally came Samuel Schuyler and George W. Kirchwey, to me personally known and known to me to be the individuals described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

CHARLES F. BRIDGE,
Com. of Deeds, Albany, N. Y.

Rec'd Aug. 5th, 1891, at 9.13 a. m.

STATE OF NEW YORK, } *ss:*
City and County of Albany, Clerk's Office, }

I, Ansel C. Requa, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy assignment with the record of the original thereof, recorded in this office on the 5th day of August, 1891, at 9.13 hour a. m., in Book No. 427 of Deeds, on page 199, &c., and that same is a correct transcript therefrom and of the whole of said record.

Seal Albany Court, July, 1847.

In testimony whereof I have hereunto set my hand and affixed my official seal this 21 day of Sept., 1891.

A. C. REQUA, *Clerk.*

55 [Endorsed:] Fol. 79. Samuel Schuyler to George W. Kirchwey. Assignment. Albany Co., *ss:* Rec'd Aug. 5th, 1891, at 9.13 m., in Liber 429 of Deeds, at page 199, &c.

56 SCHEDULE D.

United States Supreme Court.

SCHUYLER'S STEAM TOW-BOAT LINE, Plaintiff in Error,
vs.
JOHN SALISBURY, Defendant in Error.

Know all men by these presents that we, Samuel Schuyler and Thomas V. Wolcott, both of the city of Albany and State of New York, are held and firmly bound unto John Salisbury in the sum of fifteen thousand dollars, current money of the United States, to be paid to the said John Salisbury, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of February, 1888.

Whereas lately, in the supreme court of the State of New York, in a suit depending in said court between the above-named John Salisbury, as plaintiff, and Schuyler's Steam Tow-boat Line, as defendant, the said John Salisbury recovered a judgment against the said Schuyler's Steam Tow-Boat Line for $5,175.70 damages and $1,184.67 costs; and whereas on appeal from said judgment
57 to the court of appeals of the State of New York, which is the highest court in said State, the said judgment was affirmed, and the said Schuyler's Steam Tow-Boat Line is about to apply for a writ of error to remove the said cause to the Supreme Court of the United States to reverse the said judgment, and for a citation directed to the said John Salisbury, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Schuyler's Steam Tow-Boat Line shall well and truly prosecute its writ of error to effect and if it fails to make its plea good shall answer all damages and costs, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL SCHUYLER. [L. S.]
THOS. V. WOLCOTT. [L. S.]

Sealed and delivered in presence of—
MONROE CRANNELL.

UNITED STATES OF AMERICA,
Northern District of New York, County of Albany.

On this fourth day of February, 1888, before me came Samuel Schuyler and Thomas V. Wolcott, to me known to be the same persons described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

MONROE CRANNELL,
Notary Public, Albany, New York.

UNITED STATES OF AMERICA,
Northern District of New York, County of Albany.

58 Samuel Schuyler and Thomas V. Wolcott, being severally sworn, say and each for himself says that he resides in the city and county of Albany, in the State of New York; that he is worth the sum of fifteen thousand dollars over and above all debts and liabilities which he owes or has incurred, exclusive of property exempt by law from levy and sale under execution, and the said Schuyler says he is a freeholder of the county of Albany, in said State, and the said Wolcott that he is a freeholder of the county of Saratoga, in said State.

SAMUEL SCHUYLER.
THOS. V. WOLCOTT.

Severally sworn to and subscribed before me this 4th day of February, 1888.

MONROE CRANNELL,
Notary Public, Albany County, New York.

Endorsed: United States Supreme Court. Sch-yler's Steam Tow-Boat Line, pl'ff in error, *vs.* John Salisbury, def't in error. Copy bond in error. W. Frothingham, attorney for pl'ff in error, Albany, N. Y.

The foregoing bond is approved, the same to operate as a supersedeas and stay of execution.
February 6, 1888.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

Copy.

59 [Endorsed:] United States Supreme Court. Schuyler's Steam Tow-Boat Line, pl'ff in error, against John Salisbury, def't in error. Notice of motion, affidavit and schedules on motion to compel the furnishing of new sureties, &c., in error, & proof of service. J. Rider Cady, att'y for def't in error, No. 12 South 4th street, Hudson, N. Y. Original.